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# ONTARIO LABOUR RELATIONS BOARD REPORTS



**January 1988**





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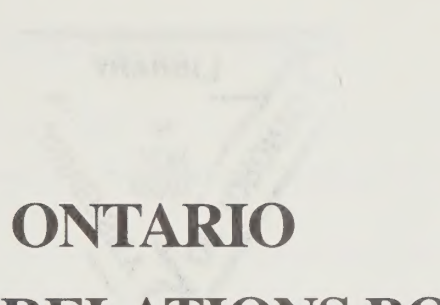
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# **ONTARIO LABOUR RELATIONS BOARD REPORTS**

**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

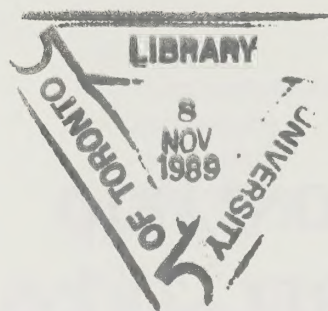
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**EDITOR: COLLEEN EDWARDS**

Selected decisions of particular reference value are  
also reported in *Canadian Labour Relations Boards  
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**2313-87-R** United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. **A. Reisman Construction Limited**; Red Banner Developments Limited; A. Reisman Holdings Limited; Fred T. Reisman & Associates Limited; Resigeorge Management Limited; A. Reisman Financial Corporation; The A. R. Primary Trust, The G. R. Primary Trust, The M. R. Primary Trust, carrying on business as Danforth Holdings Company (1966); Al Reisman Limited; and George Reisman Limited, Respondents

**Practice and Procedure - Related Employer - Sale of a Business - By letter applicant seeking to add 8 additional respondents and requesting a new terminal date - No particulars provided - Notwithstanding sections 1(5) and 63(3), Rules of Procedure and natural justice require an applicant to provide written particulars of both the allegations of fact and relief sought - Pre-hearing conference ordered**

**BEFORE:** *G. T. Surdykowski*, Vice-Chair, and Board Members *D. A. MacDonald* and *J. Redshaw*.

**APPEARANCES:** *David McKee*, *Tony Bucci* and *Dory J. Smith* for the applicant; *Pamela Yudcovitch* and *Fred Reisman* for Fred T. Reisman & Associates and M. R. Primary Trust; *Joe Carrier*, *Manny Brykman* and *Al Reisman* for A. Reisman Construction Limited and Red Banner Developments Limited; *Carl W. Peterson* for George Reisman Limited, Resigeorge Management Limited and G. R. Primary Trust, respondents.

**DECISION OF THE BOARD;** January 29, 1988

1. This application for declarations pursuant to sections 1(4) or 63 of the *Labour Relations Act* came on for hearing on January 25, 1988. At that time, the Board directed that A. Reisman Holdings Limited; Fred T. Reisman & Associates Limited; Resigeorge Management Limited; A. Reisman Financial Corporation; The A. R. Primary Trust, The G. R. Primary Trust, The M. R. Primary Trust, carrying on business as Danforth Holdings Company (1966); Al Reisman Limited; and George Reisman Limited be added as party respondents.
2. Upon hearing the representations of counsel, the Board granted a request, by George Reisman Limited, Resigeorge Management Limited, The G. R. Primary Trust, Fred T. Reisman & Associates Limited, and The M. R. Primary Trust, for an adjournment.
3. In addition, upon motion of counsel for the respondents referred to in paragraph 2 above, the Board directed the applicant to provide full particulars of the material facts upon which it relies and the relief which it claims against the respondents named in paragraph 1 above. This direction is to be complied with forthwith and certainly no later than March 11, 1988.
4. The Board observes that this application was filed on November 18, 1987. By letter from counsel dated December 23, 1987, the applicant sought to add 8 additional respondents (7 of which have been added as set out in paragraph 1 above) and requested that a new terminal date be set for the application. Other than addresses, the letter provides no particulars whatsoever with respect to the entities named, either with respect to the manner in which these are alleged to be associated or related activities or businesses which are or were carried on under common control or direction, or otherwise. Nor does the letter indicate what relief is claimed against them. Presumably, a party seeking declaratory relief under section 1(4) or section 63 of the Act has information which led it to make the application in the first place. Accordingly, and notwithstanding the pro-



visions of sections 1(5) and 63(3), which are procedural in nature, the Board's Rules of Procedure and natural justice require an applicant in a proceeding such as this to provide *written* particulars of both the allegations of fact upon which the application is based, and the relief being sought. Neither a respondent, nor the Board, should be required to "guess" or assume what is being alleged or sought. Because of the difficulties that can result, it is not usually, and was not in this instance, sufficient or desirable to provide the required particulars, or any of them verbally.

5. It also appeared to the Board that a pre-hearing conference might be useful in this matter. Accordingly, the Registrar is directed to schedule a pre-hearing conference, to be held before a Vice-Chair of the Board, for April 11, 1988, which date was agreeable to the parties present at the hearing. The parties are directed to bring to the pre-hearing conference all documents in their possession, power, or control which relate to the matters in issue, whether or not they intend to rely upon them.

6. The Registrar is further directed to schedule this matter to be heard on April 18 and 19, 1988, which dates were also agreeable to the parties present at the hearing. The purpose of the hearing is to hear the evidence and representations of the parties with respect to all matters arising out and incidental to the application.

7. The parties are directed to agree on four further dates in May 1988, from which the Board will select two to be used in the event that the hearing cannot be concluded in a time scheduled as aforesaid. The parties are directed to advise the Registrar four agreed dates by February 18, 1988.

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**2639-87-FC United Brotherhood of Carpenters and Joiners of America Local 27, Applicant v. Nickey Holdings Ltd. and Maddalena Holdings Ltd., c.o.b. as Artistic Railings, Respondent**

**Construction Industry - First Contract Arbitration - Respondent not filing reply to first contract application - No one appearing on behalf of respondent at hearing - Negotiating history indicating that only one bargaining session was held - Respondent subsequently refusing to bargain - First contract directed**

**BEFORE:** *Ken Petryshen*, Vice-Chair, and Board Members *R. M. Sloan* and *D. Patterson*.

**APPEARANCES:** *J. J. Nyman* and *Frank D'Abbondanza* for the applicant; no one appearing on behalf of the respondent.

**DECISION OF THE BOARD;** January 11, 1988

After considering the evidence and the applicant's submissions and after recessing to consider the matter, the Board gave the following decision orally at the hearing on January 11, 1988:

- (1) This is an application under section 40a of the *Labour Relations Act* in which the applicant seeks a direction from the Board that a first

collective agreement between itself and the respondent be settled by arbitration.

- (2) The application was filed with the Board on December 22, 1987. The Board's Practice Note #18 requires that a respondent, if it intends to oppose the application, file a reply to the application within ten days from the day the application was delivered to it by the applicant. Although properly served with the application, the respondent did not file a reply.
- (3) The first day of hearing in this matter was scheduled for January 11, 1988. Since no one had appeared on behalf of the respondent when the proceedings commenced at 9:30 a.m. on January 11, 1988, the Board, following its usual practice, waited until 10:00 a.m. before starting the hearing. When the proceedings recommenced at 10:00 a.m., no one had appeared for the respondent. The Notice of Hearing sent to the respondent by the Registrar of the Board is dated December 30, 1987.
- (4) Doug Wray, the primary negotiator for the applicant, was called to testify in support of the application.
- (5) The United Brotherhood of Carpenters and Joiners of America Local 27 ("Local 27") was certified by the Board on June 3, 1987 to represent all carpenters, carpenters' apprentices, labourers, ironworkers and ironworkers' apprentices in the employ of Nickey Holdings Ltd. and Maddalena Holdings Ltd., c.o.b. as Artistic Railings ("Artistic") in Board Area #8 in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman. Local 27 gave notice to bargain to Artistic by letter dated June 12, 1987. The first and only bargaining session occurred on September 18, 1987. At that meeting, Local 27 presented its proposals to Nick Prioriello, Artistic's president, and M. Drudi, Artistic's counsel. Since the Artistic representatives wanted time to consider the proposals, another bargaining session was scheduled for September 25, 1987.
- (6) On September 24, 1987, Wray called Drudi at approximately 9:30 a.m. and was advised by Drudi that he was no longer acting for Artistic. Drudi suggested that Wray phone Prioriello and gave Wray his telephone number. Wray phoned Prioriello at approximately 9:35 a.m. When Wray asked Prioriello if he was going to meet with the union the next day to bargain, Prioriello said no. Prioriello advised Wray that he was not interested in negotiating with the union and that he did not want the union. Prioriello responded in the affirmative when Wray asked him if he was refusing to meet to negotiate. Prioriello told Wray that the railing companies had decided not to negotiate until the Carpenters organized the builders and organized all the railing companies. Prioriello refused to acknowledge that Artistic had any obligation to bargain with Local 27. Prioriello

advised Wray that he told his employees that he was not going to negotiate with the union and that if they wanted the union they should go with the union. The conversation concluded by Wray advising Prioriello that the union would likely take the matter to the Labour Board.

- (7) On September 29, 1987, Local 27 made a request for the appointment of a conciliation officer. The Minister of Labour appointed a conciliation officer by letter dated October 9, 1987. The conciliation officer set up a meeting for November 13, 1987. Local 27 attended this meeting but no one appeared on behalf of Artistic. A "no board" report was released dated November 24, 1987.
- (8) The material and evidence before us discloses that the process of collective bargaining has been unsuccessful. At least from September 24, 1987 to the present, Artistic has refused to recognize the bargaining authority of the trade union. In addition, the respondent has failed to make reasonable or expeditious efforts to conclude a collective agreement. Since the pre-conditions set out in section 40a(2)(a) and (c) have been met, the Board will grant the requested relief.
- (9) Accordingly, the Board hereby directs the settlement of a first collective agreement by arbitration.

**1931-87-U Local 27, United Brotherhood of Carpenters and Joiners of America, Complainant v. Local 183, Labourers International Union of North America, Bay-Tower Homes Company Ltd., Bay-Tower Management Inc., Ledi Properties Inc., 518270 Ontario Limited, 554614 Ontario Limited, Respondents**

**Practice and Procedure - Unfair Labour Practice - Complaint that through an illegal recognition strike Labourers Local 183 was able to pressure the respondent employers into signing collective agreements which would interfere with Carpenters Local 27's bargaining rights - Board reserving on question of whether Local has standing to bring the complaint pursuant to sections 70 and 74 - Complaint to proceed on its merits**

**BEFORE:** *Robert Herman*, Vice-Chair, and Board Members *J. A. Rundle* and *C. A. Ballentine*.

**APPEARANCES:** *David McKee* and *Luis Camara* for the applicant; *C.M. Mitchell* for the respondent.

**DECISION OF THE BOARD;** January 29, 1988

1. In this complaint pursuant to section 89 of the *Labour Relations Act*, Local 27 of the Carpenters Union alleges that Local 183 of the Labourers Union has violated sections 3, 60, 65, 67(2), 70 and 74 of the Act.
2. Although notified of these proceedings, together with notice that the complainant was



seeking to add them as respondents, none of the respondent employers attended at the hearing. After submissions from the complainant and respondent Labourers Local 183, the Board directed that the employers so listed be added as party respondents.

3. The respondent Labourers Local 183 raised two preliminary objections to the complaint being heard on the merits. With respect to paragraphs one to eighteen of the complaint, Labourers Local 183 submitted that the complainant had no standing or status to bring the complaint, or in the alternative (with respect to some of the pleaded sections) no *prima facie* case was disclosed. With respect to the issue(s) raised in paragraph 19 of the complaint, Labourers Local 183 submitted that the Board ought to exercise its discretion pursuant to section 89 and decline to hear the complaint either because of delay or in the alternative, because to entertain this aspect of the complaint would constitute an abuse of the Board's process. In order to understand the preliminary objections it is necessary to set out Schedule A of the complaint, containing the particulars and remedial relief requested:

1. Local 27, United Brotherhood of Carpenters and Joiners of America (hereinafter referred to as "Carpenters Local 27"), is a party to a collective agreement with M. M. Amarcord Carpenters Ltd., and has been for many years.
2. In Board File 0302-87-R, Local 183, Labourers International Union of North America (hereinafter referred to as "Labourers Local 183"), has applied to displace Carpenters Local 27 as bargaining agent for the employees of M. M. Amarcord Carpenters Ltd. A vote has been held and the ballot box sealed, pending the outcome of examinations to determine the list and the entitlement of Labourers Local 183 to have the vote counted.
3. M. M. Amarcord Carpenters Ltd. (hereinafter referred to as "Amarcord"), is a framing carpentry contractor. It currently has a subcontract from Bay-Tower Homes Company Ltd. and Bay-Tower Management Inc. at Morningside and Finch. Amarcord has been the main framing subcontractor for Bay-Tower Homes Company for several years. Members of Carpenters Local 27 are at work on the site.
4. Bay-Tower Homes Company Ltd. (hereinafter referred to as "BTH"), and Bay-Tower Management Inc. (hereinafter referred to as "BTM") are two companies which are allegedly associated in some fashion with Ledi Properties Inc., 554614 Ontario Ltd., and 518270 Ontario Ltd.
5. The existence and relationship among these corporations has been known to Labourers Local 183 for some time. In Board File 1744-85-R, it applied for certification for all but 518270 Ontario Ltd. relying on Section 1(4) of the Act. This application was withdrawn October 30, 1985.
6. In Board Files 3123-85-R and 0323-86-U, Labourers Local 183 again sought certification for all five (5) corporations relying on cards filed and on Section 8 of the Act. It ultimately received a Section 144(1) certificate in respect of all construction labourers in the employ of 518270 Ontario Ltd. on September 4, 1986. A "no board" report was issued December 8, 1986 in respect of this certificate.
7. 518270 Ontario Ltd. became dormant shortly after the certificate was issued.
8. The principals of the corporation, Joseph Wolf and Art Saccoccia, met with the following representatives of Labourers Local 183:
  - a) February or March 1987, with John Stefanini, Manuel Lago and Quinto Ceolin, at the Ontario District Council offices;
  - b) April 1987, with Manuel Lago and Quinto Ceolin at the Abruzzi Restaurant; and

- c) August 16, 1987, with Chester de Toni, Quinto Ceolin and Manuel Lago at the Trimonte Restaurant.

At each of these meetings representatives of Labourers Local 183 demanded that Messrs. Wolf and Saccoccia enter into a collective agreement for all five (5) corporations. The agreement proposed was the current agreement between Labourers Local 183 and the Toronto Housing Labour Bureau.

9. The employer representatives' position was that they were prepared to execute the agreement in respect of construction labourers employed by all five (5) corporations, but that they would not execute the agreement so long as it contained restrictions on subcontracting of work, and particularly of frame carpentry. The effect of executing this clause would require BTH and BTM to terminate the subcontract now held by Amarcord. Members of Carpenters Local 27 employed by Amarcord would be required to leave the site.
10. Representatives of Labourers Local 183 advised the employers that they would set up a picket line at the Morningside and Finch site if the agreement was not signed. The employers continued to refuse to execute the agreement.
11. On Thursday, August 27, 1987, the threatened picket line was set up. Agents and officers of Labourers Local 183 including Michael Reilly, Rocco Lotito, Chester de Toni, and John Colacci attended on the picket line.
12. The effect of the picket line was to deter from reporting to work employees of the following subcontractors all of which have collective agreement with Labourers Local 183:
  - a) Greenwall Forming Limited (basement forming)
  - b) Nebb Forming Ltd. (basement forming)
  - c) Dranco Construction Ltd. (sewers and drains)
13. On Thursday, August 27, 1987, some of the carpenters employed by Amarcord crossed the picket line in spite of vigorous attempts by picketers to dissuade them. Some left early that day. By Saturday, August 29, 1987, only one or two carpenters crossed the picket line.
14. The employers, BTH and BTM, brought an application under Section 135 for an order requiring Labourers Local 183 to cease and desist from forming its picket line (Board File 1445-87-U). Carpenters Local 27 brought a related application under Section 135 (Board File 1447-87-U).
15. The hearing of Board File 1445-87-U proceeded Friday, August 28, and Saturday, August 29, 1987. No significant construction occurred at the Morningside and Finch site during those three (3) days.
16. On Saturday, August 29, 1987, the employers agreed to execute the THLB agreement including the subcontracting clause. The picketting ceased.
17. On Monday, August 31, 1987, the employers withdrew its application under Section 135. Carpenters Local 27 withdrew its application without prejudice to its right to file the instant complaint.
18. It is the submissions of Carpenters Local 27 that Labourers Local 183 has, by means of an unlawful recognition strike, obtained bargaining rights aimed directly at interfering with the bargaining rights of Carpenters Local 27.
19. Further, the Applicant asserts that at the time the collective agreement or agreements referred to in paragraph 16, Labourers Local 183 was not entitled to represent any

employees of any of the corporate employers other than construction labourers of 518270 Ontario Ltd., and that any collective agreement or agreements as between those employers and L.183 of wider scope are therefore void.

RELIEF SOUGHT:

1. A declaration that Labourers Local 183 has violated Sections 3, 60, 65, 67(2), 70 and 74 of the *Labour Relations Act*.
2. A declaration that the subcontracting restrictions in the collective agreement between Labourers Local 183 and the employer is null and void.
3. A declaration that any collective agreement between Labourers Local 183 and any of the employers (except one covering construction labourers of 518270 Ontario Ltd.) is void.

4. For purposes of deciding the preliminary objections, the Board assumes that the facts alleged in the complaint are both true and provable. As counsel indicated in submissions, this complaint represents only a part of the ongoing saga between the complainant and Labourers Local 183. For an understanding of the context and background to the instant complaint, we refer to the history set out in a prior decision of the Board on point: *Toronto Housing Labour Bureau* [1987] OLRB Rep. Sept. 1178.

5. Turning to the first preliminary objection, whether Carpenters Local 27 has standing to bring the instant complaint, we consider this issue with respect to the individual sections pleaded in the complaint. It was common ground between the parties that a complaint pursuant to section 3 cannot stand alone, and if Carpenters Local 27 has no standing pursuant to any other section of the Act, the complaint pursuant to section 3 must also be dismissed.

6. The complaint is hereby dismissed with respect to section 60. In order to have standing to bring a complaint pursuant to this section, on the explicit wording of section 60(1), the complainant must either be an employee in the bargaining unit or a trade union representing an employee in the bargaining unit. Carpenters Local 27 does not (and could not) claim to be an “employee in the bargaining unit”, nor is there any suggestion in the complaint that Carpenters Local 27 represents any employees in the bargaining units covered by the collective agreements between Labourers Local 183 and any of the respondent employers. In these circumstances, we are satisfied that the complainant has no standing to file the section 60 complaint.

7. The complainant in effect withdrew the complaint pursuant to section 65, acknowledging that it was not alleging a breach of this section.

8. The complaint pursuant to section 67(2) of the Act is also dismissed, as the facts as pleaded do not disclose a *prima facie* case pursuant to this section. Section 67(2) was designed to protect the right of a trade union which has the legal right to represent employees in a bargaining unit, to represent such employees in their employment relationship without interference from other trade unions. The complaint does not set out any facts suggesting that Labourers Local 183 has attempted in any way to interfere with the representation by Carpenters Local 27 of the employees represented by Local 27 with respect to the subcontractor Amarcord, the only employees that the complainant represents. In this regard, the complainant asserts, with no facts pleaded in support, that Labourers Local 183 “obtained bargaining rights aimed directly at interfering with the bargaining rights of Carpenters Local 27”. (See paragraph 18 of the complaint). The mere assertion of this does not constitute a *prima facie* case. No facts are alleged suggesting how or when the complainant’s bargaining rights might have been interfered with. And the fact that any or all of the respondent employers might have signed collective agreements with Labourers Local 183 in the



circumstances alleged, does not of itself imply that the bargaining rights held by Carpenters Local 27 with Amarcord have in any way been affected, nor that there has been any interference with its ability to represent employees in the Amarcord bargaining unit. Nor did counsel for the complainant suggest in oral submissions how the Labourers' conduct could have interfered with those bargaining and representational rights. In these circumstances, we are satisfied that no *prima facie* case has been alleged.

9. With respect to the remaining two sections, sections 70 and 74 of the Act, the complaint in essence alleges that through activity impermissible under the Act, an illegal recognition strike, Labourers Local 183 was able to pressure the respondent employers into signing the respective collective agreements. Carpenters Local 27 alleges that the result gained by this illegal activity either has or will directly interfere with the bargaining rights held by Local 27, or alternatively (as expanded in oral submissions), interfere with the work members of Local 27 perform pursuant to the collective agreement between Local 27 and subcontractor Amarcord. Local 27 argued that precluding it from filing the instant complaint with respect to this illegal conduct would be to sanction the illegal behaviour of Labourers Local 183 and prevent the injured party from seeking redress for any consequences.

10. Given the legal issues raised, the specific wording of sections 70 and 74 of the Act, the construction industry context, and the historical and ongoing dispute between the Carpenters and Labourers, we are not prepared at this preliminary stage to preclude Carpenters Local 27 from having this aspect of the complaint heard on its merits. Accordingly, reserving on the issue of whether Carpenters Local 27 has standing to bring the complaint pursuant to sections 70 and 74, the complaint will proceed on its merits with respect to the alleged breach of these two sections and on the basis of the material facts pleaded in the complaint with respect to the allegedly illegal strike. In light of our comments above, the complaint will also proceed with respect to section 3 of the Act.

11. The second preliminary objection, as characterized by the respondent Labourers Local 183, is whether paragraph 19 of the complaint ought to be struck and whether the complainant ought to be precluded from raising the matters set out in that paragraph. Both parties made lengthy submissions on this matter but we do not consider it necessary to set them out here. Suffice to say that Labourers Local 183 submitted that the allegations and issues contained in paragraph 19 of the complaint raise the very issue that a prior panel of the Board would not allow the Carpenters to raise, on the grounds of delay and abuse of process: *Toronto Housing Labour Bureau, supra*. It is Local 183's position that it would be an even greater abuse to countenance the raising of this issue in this proceeding. In response, counsel for Carpenters Local 27 characterized paragraph 19 as more properly consisting of argument, and submitted that such matters could in fact be raised by way of argument. The Board has concluded that paragraph 19 need not be struck from the complaint. The case that the Board will hear is confined, with reference to the material facts pleaded in paragraphs 1 to 19 of the complaint, to whether Labourers Local 183 breached either or both of sections 70 and 74 of the Act. Absent a finding of such breach, no remedy can or would issue. If the Board does conclude that Labourers Local 183 has breached the Act, then Carpenters Local 27 can argue that the appropriate remedy includes a declaration that either the subcontracting provisions in the collective agreements or the collective agreements themselves are null and void. There is, however, no suggestion in the complaint that the signing of the collective agreements, whether or not there were employees in the bargaining units at the time the agreements were signed, constituted breaches of sections 70 and 74 of the Act. The ambit of the case will accordingly be restricted to what is arguably relevant to the alleged breach(s) of sections 70 and 74, as particularized in the complaint, and as we have summarized in paragraph 9 above.

12. The hearing of this matter will proceed on the dates already scheduled: February 19, 22, 24, and 29, 1988.

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**2066-87-R** Canadian Paperworkers Union, Applicant v. **Boise Cascade Canada Ltd.**, Respondent v. Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of North America, Intervener #1 v. Local Union 559 of the International Brotherhood of Electrical Workers, Intervener #2

Abandonment - Certification - Conciliation - Timeliness - Whether twelve month bar to certification application after appointment of conciliation officer in effect - Applicant alleging *de facto* abandonment of bargaining rights by incumbent union prior to appointment of conciliation officer - Applicant also arguing that for bar to apply there must be a reasonable expectation that the incumbent union's bargaining rights will subsist for the twelve month period - Board finding that bar in effect - Application dismissed as untimely

**BEFORE:** *Nimal V. Dissanayake*, Vice-Chair, and Board Members *J. A. Ronson* and *H. Peacock*.

**APPEARANCES:** *N. Jesin*, *M. Hunter* and *C. Makowski* for the applicant; *D. T. Wakely*, *D. B. Francis* and *J. Harty* for the respondent; *Laurence Arnold* and *Rene Brixhe* for Intervener #1, *Wm. J. Moore* for Intervener #2.

**DECISION OF THE BOARD;** January 6, 1988

1. The name of Intervener #1 is amended to read: "Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of North America".
2. This is an application for certification in which the applicant seeks bargaining rights for a bargaining unit of employees of the respondent described as follows:
 

all employees of the respondent employed in its Kenora Sawmill complex and yard operations, including any additional operations in conjunction with the present Mill and Yard operations, save and except foremen, persons above the rank of foreman, office and sales staff.
3. After the opening addresses from the parties, the representative for Intervener #2 informed the Board that he was satisfied that the bargaining rights held by Intervener #2 were not affected by this application, and that he was accordingly withdrawing from this proceeding.
4. Counsel for Intervener #1 (hereinafter referred to as "Local 2693") took the position in his opening address that this application is untimely. Counsel for the respondent also submitted that this application is untimely under section 61(2) of the *Labour Relations Act* and that it ought to be dismissed. The Board heard submissions from all counsel on this timeliness issue.
5. The following facts are not in dispute between the parties. Local 2693 was certified by the Board on June 1, 1986 as bargaining agent for the employees affected by this application. The most recent collective agreement between these two parties had an expiry date of August 31, 1986.

On April 23, 1986, Local 2693 gave notice of its desire to bargain with respect to a renewal collective agreement. The Board finds that this notice was given in accordance with the collective agreement and that therefore, by virtue of section 53(2) of the Act, it was in compliance with section 53(1). On March 19, 1987, the parties were notified of the appointment of a conciliation officer by the Minister of Labour. A "no-board" report was issued on June 2, 1987. On June 8, 1987, the parties were advised that a mediator has been appointed to assist in negotiations. The present application for certification was filed on October 27, 1987.

6. In support of their position that this application is untimely, counsel for the respondent and counsel for Local 2693 rely on section 61(2) of the *Labour Relations Act* which reads as follows:

61.-(2) Where notice has been given under section 53 and the Minister has appointed a conciliation officer or a mediator, no application for certification of a bargaining agent of any of the employees in the bargaining units as defined in the collective agreement and no application for a declaration that the trade union that was a party to the collective agreement no longer represents the employees in the bargaining unit as defined in the agreement shall be made after the date when the agreement ceased to operate or the date when the Minister appointed a conciliation officer or a mediator, whichever is later, unless following the appointment of a conciliation officer or a mediator, if no collective agreement has been made,

- (a) at least twelve months have elapsed from the date of the appointment of the conciliation officer or a mediator; or
- (b) a conciliation board or a mediator has been appointed and thirty days have elapsed after the report of the conciliation board or the mediator has been released by the Minister to the parties; or
- (c) thirty days have elapsed after the Minister has informed the parties that he does not consider it desirable to appoint a conciliation board,

whichever is later.

Counsel submits that whether the 12-month period contemplated in section 61(2)(a) is calculated from the date of appointment of the conciliation officer or of the mediator, this application filed on October 27, 1987 is clearly untimely.

7. Counsel for the applicant on the other hand disagrees that this application is untimely. While he concedes that the appointment of a conciliation officer or mediator normally triggers the provisions of section 61(2), he argues that section 61(2) envisages a "lawful" appointment of a conciliation officer or mediator. He submits that for an appointment of a conciliation officer or mediator to be lawful, at the time of such appointment the trade union must have bargaining rights. In addition, he submits that for the 12-month bar in section 61(2) to apply, there must be a reasonable expectation that the incumbent trade union's bargaining rights will subsist for a period of at least 12 months from the date of appointment of the conciliation officer or mediator. Counsel submitted that he was prepared to lead evidence that Local 2693 had either abandoned bargaining rights through inaction prior to the appointment of the conciliation officer or mediator, or that Local 2693 does not intend to retain bargaining rights for a period of 12 months from the date of such appointment. In the former situation, counsel claims that the appointments in question are a nullity and of no legal consequences. In the latter situation, section 61(2) does not apply since it is predicated on the condition that bargaining rights will continue for at least 12 months. Counsel further submits that to dismiss this application will be to deny employees a right to select a trade union of their choice. Finally, counsel submits that in the event the Board does not accept his submissions, the Board should defer its decision to allow the applicant to file a section 89 complaint.



8. The applicant is not claiming that there has been formal abandonment of bargaining rights by Local 2693. Nor is there a prior Board decision to that effect. The applicant is alleging *de facto* abandonment on the basis that since the expiry of its previous collective agreement, Local 2693 had been inactive for over a period of a year preceding the appointment of the conciliation officer.

9. For the purpose of this decision, the Board is prepared to accept the applicant's allegation of inaction by Local 2693 as proven. While failure by a trade union to pursue its bargaining rights over a lengthy period leaves much to be desired, the appointment of the conciliation officer and Local 2693's participation in meetings with the officer is a clear indication that it intended to resume pursuing its bargaining rights. In the face of the clear wording of section 61(2), the Board is not prepared to go behind the conciliation appointment where the claim is based on an alleged *de facto* abandonment. In *Midmetro Plastics Limited*, [1985] OLRB Rep. Feb. 302, the Board found that there had in effect been *de facto* abandonment by the incumbent trade union. However, while noting that it was troubled by the union's inaction and the technical nature of its defence based on the appointment of a conciliation officer, the Board nevertheless held that the appointment of a conciliation officer rendered the application for termination of bargaining rights untimely. Similarly, the Board is of the view that no application is timely on these facts before the Board, until the timeliness provisions of section 61(2) have been met.

10. The Board does not agree that for section 61(2) to operate there has to be some guarantee that the incumbent's bargaining rights will continue for a period of 12 months. Even assuming that there is some evidence of intention on the part of Local 2693 to abandon bargaining rights as the applicant claims, the Board cannot act on the basis of a future event.

11. The Board is not persuaded by the applicant's plea based on employee freedom of choice. The fact is that the employees in question and the applicant did have the benefit of an open period during which there was an opportunity to challenge Local 2693's bargaining rights. Having failed to act before the open period ended by the onset of the conciliation process, there is no justification for complaint now.

12. The Board is not disposed to defer a decision in this application to allow the applicant to file a complaint under section 89. The Board is not prepared to speculate as to the exact nature of the contemplated complaint, whether the applicant will be successful, and if so what remedy will be directed by the Board. In any event, if a certification application becomes timely as a result of some remedy obtained in such a proceeding or by the satisfaction of the time limits in section 61(2), this decision will not prejudice the right of the applicant to file another application at the appropriate time.

13. For the foregoing reasons, this application is hereby dismissed.

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**2142-87-R United Steelworkers of America, Applicant v. Caddiford Investments Limited, Respondent**

**Certification - Employee Reference - Practice and Procedure - Parties agreeing to bargaining unit description but in dispute as to whether certain persons were in the unit so described - Hearing waived and parties agreeing to appointment of officer under section 106(2) - Board declining to appoint officer - Appropriate procedure is for parties to make an attempt to resolve their dispute - Certificate issuing**

**BEFORE:** *Nimal V. Dissanayake*, Vice-Chair, and Board Members *J. A. Ronson* and *H. Peacock*.

**DECISION OF THE BOARD;** January 14, 1988

1. This is an application for certification in which the parties met with a Labour Relations Officer on the day scheduled for hearing of this matter, reached agreement on most matters in dispute between them and further agreed to waive their right to a formal hearing in the matter.
2. The name of the respondent is amended to read: "Caddiford Investments Limited".
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in its M.B.M. Ceramics Division in the Municipality of Metropolitan Toronto, save and except supervisors and foremen, persons above the rank of supervisor and foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. While the parties were agreed as to the description of the bargaining unit, they were in dispute as to whether certain persons were in the unit so described. While the respondent claimed that these six individuals were employees for the purpose of the Act, the applicant took the position that by virtue of section 1(3)(b) they should be excluded.
6. The Officer then advised the parties that upon considering all of the possible results of their dispute over whether any of those six persons was an employee in the bargaining unit on which they had agreed, the membership evidence the applicant had filed was sufficient in every case to establish that more than fifty-five per cent of the employees in the unit were members of the applicant at the relevant time.
7. It was on the basis of this information that the parties agreed to waive the right to a hearing. However, they also agreed that the Board would, while issuing a certificate to the applicant, also appoint a Labour Relations Officer to conduct an examination under section 106(2) of the Act as to the duties and responsibilities of the six persons in dispute.
8. The Board is not inclined to appoint an Officer under section 106(2) at this point in time. It is clear that the applicant is in these circumstances entitled to a final certificate. (*Robin Hood Multifoods Inc.*, [1985] OLRB Rep. July 1159.) Section 106(2) reads as follows:

106(2) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to

whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

9. It is clear from a reading of that section that an appointment under it is envisaged only where a question as to whether a person is an employee or guard arises “in the course of bargaining for a collective agreement” or “during the period of operation of a collective agreement”. These parties are yet to commence bargaining. The appropriate procedure would be for the parties to make an attempt to resolve their dispute with respect to the six persons in negotiations, and if unsuccessful, to make an application under section 106(2) at that time.

10. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 20, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. A certificate will issue to the applicant.

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**2007-87-FC Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. Crane Canada Inc., Respondent**

**First Contract Arbitration - Employer consistently using negotiators who were ill-prepared, lacking adequate bargaining authority or unwilling to contribute to the bargaining process - No defence to a section 40a application that what the employer was offering in wages was no less than what would likely be awarded in the terms of a first contract under the Act - Process of collective bargaining unsuccessful because employer failed to make reasonable or expeditious efforts to conclude a collective agreement - First contract directed**

**BEFORE:** *Rosalie S. Abella*, Chair, and Board Members *W. Correll* and *A. HersHKovitz*.

**APPEARANCES:** *Nelson Roland*, *John A. Stewart*, *Larry Bouillon* and *Conrad Sobon* for the applicant; *E. Rovet*, *Robert A. Hall* and *A. Sabada* for the respondent.

**DECISION OF THE BOARD;** January 15, 1988

1. This is an application for a direction that a first collective agreement be settled by arbitration pursuant to section 40a of the *Labour Relations Act*. At the outset of these proceedings, both parties agreed to waive the statutory time limits.

### THE FACTS

2. The union was certified on December 23, 1986, gave Notice to Bargain on January 14, 1987, and gave its first set of proposals to the company, Crane Canada Inc., on January 29, 1987. The company tendered its first proposal on February 2, 1987. Negotiating sessions dealing with non-monetary issues took place on March 12, March 23, April 7, April 10, May 19. By mutual agreement, the monetary issues, including benefits, were to be dealt with with the assistance of a



Conciliation Officer. By the end of the May 19 session, most non-monetary and language issues had been agreed upon and the union, therefore, requested the appointment of a Conciliation Officer to deal with the outstanding issues. An officer was appointed on June 1 and the first meeting under her auspices took place on June 30, 1987.

3. There is no dispute between the parties that prior to the June 30th meeting, negotiations had gone well. The company had been represented by A. Dixon, Manager of the plant, Robert Hall, Vice-President responsible for the company's Supply Division consisting of 40 branches across Canada, and their counsel Ernest Rovet. The union was consistently represented by John Stewart, Recording Secretary of Local 419 and Larry Bouillon, the union steward.

4. The union's application is based on the events at the subsequent negotiating sessions which took place on June 30, August 26 and October 6, 1987. It is their contention that the company's conduct from June 30 until the date of this application on October 22 represents "the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement", in accordance with section 40a(2)(c) of the Act. Although considerable evidence was led dealing with the details of the pre-June bargaining sessions, in view of the assertions of both parties that these sessions proceeded routinely, there is no need to outline them here.

5. Going into the June 30th session, the outstanding issues were union security (Article 4.01 of the Company's May 19, 1987 draft agreement), the selection of persons to act as arbitrators (Article 7.02), qualifications for entitlement to Statutory Holidays (Article 12.03 and 12.04), seniority in the event of work absence (Article 14.02 (e) and (f)), the term of the agreement and retroactivity of wages (Article 23.01), health and welfare benefits (Article 17), and wages, including shift premiums (Article 10). In addition, there remained outstanding those items listed as an Addendum on page 38 of the Company's May 19th proposal, including the provision of winter jackets, sick leave, and severance pay. It is worth noting that on two key items - contracting out, and the designation of specific shifts - the union felt it had made major concessions "in the spirit of cooperation" and in the hopes that their compromises on these significant matters would inspire generosity from the company on monetary issues.

6. Based on the relative ease of the negotiating sessions up to and including May 19th, the union attended the June 30th meeting feeling optimistic that a collective agreement could be achieved before the strike deadline of July 24, 1987. When they attended the June 30th meeting with the Conciliation Officer, however, the company would tender no proposal on wages because it felt that the parties were too far apart on amounts. Nor did any discussion take place on the outstanding non-monetary issues because of the company's view that the wage disparity was so great as to make negotiations fruitless that day. Counsel for the company also suggested that a later session, closer to the July 24th strike deadline, might generate a moderated stance from both parties. The union, although frustrated by the inability to achieve agreement on any matters, or even to learn of the company's position on wages, hoped that "once the clock started to tick", the parties could again meet. They requested a 'No Board' report at the end of the brief June 30th session and it was granted on July 7.

7. On July 20, on his own initiative, a different Conciliation Officer convened a meeting between the parties for July 22. Although Dixon was not present for this meeting, the usual negotiating team for each side attended. The union found the company's position "inexcusable". The company was not prepared to provide any paid sick leave except on the existing discretionary basis, and even then only on the condition that the existing corporate practice not be part of the collective agreement; in exchange for a new company proposal on severance pay, it wanted the union to delete a clause dealing with vacation pay for employees with 15 years' seniority even

though the term had previously been agreed to by the parties; it would not agree to a successor rights clause; it refused to pay shift premiums; it would not change its position on the seniority provisions in Article 14.02; it agreed to a one year term, but commencing prospectively from August 1, 1987 rather than from the date of certification (December 23, 1986) or the first notice to bargain (January 14, 1987); it agreed to the union's request that the Teamsters' Health and Welfare plan be implemented rather than its own, but proposed wages sufficiently close to the existing pay scale (an increase of 25 cents/hour) that they would have resulted in a significantly lower take-home pay given the combined cost of this plan (40-50 cents/hour) and union dues (\$16.00/month).

8. The union thus found itself in the "very embarrassing" position of being faced with a proposal that would provide less or no financial benefit to employees in joining the union. They were particularly upset because 3 workers were red-circled, 2 of whom had left the company two weeks before this proposal was presented, the third being the union organizer and steward, Larry Bouillon, who had attended all the negotiating sessions for the union. Bouillon had been hired by the company in September 1986 at a higher wage than most employees in the bargaining unit because of his more than 25 years in the plumbing supply business. Moreover, the company consistently failed to provide specific information on its own Health and Welfare package to enable the union to decide if it provided an acceptable and cheaper alternative to the union's benefit package, even though Hall admitted that pamphlets on the company plans existed and were readily available.

9. Stewart took the company's proposal back to the membership at a meeting he subsequently called for July 23. Based on the terms, and on the red-circling of their union steward, they voted 9-1 in favour of a strike. On the next day, July 24, the union, though entitled to strike, delivered a letter to Dixon asking for further negotiations so that a strike could be averted. Four days later, on July 28, having received no response from the company, the union went on strike. They remain on strike.

10. In mid-August, the conciliator who had conducted the July 22nd meeting convened a further one for August 26, 1987. Although the union negotiating team remained the same, the company did not send their counsel and replaced Hall with Doug McLean, the Industrial Relations Director for Crane Canada Inc. At the outset of this session, when the parties met face-to-face, McLean apologized for having no history of what had gone on in negotiations to date. In the course of the 1-1/2 hour meeting, the union had to explain much of what was at issue and gave McLean a revised monetary proposal. No progress was made on non-monetary issues and the company neither responded to the union's revised wage proposals, except to suggest that they were still too high, nor offered any position on the non-monetary issues. Nothing was accomplished at the meeting, but McLean suggested to Stewart that he call him in Montreal to discuss the issues.

11. On September 14, Stewart called McLean and asked if he had any position on the union's latest proposals or the resolution of the outstanding issues. McLean explained that he was preoccupied with the sale of the company's Plumbing Division and had had no time to deal with this set of negotiations. Stewart suggested that the company develop a grid for wages, whereby the hourly wages would be pegged to seniority. McLean was non-committal, indicating that after he considered it more fully and checked with his superior, he'd call Stewart on September 16th. On the 16th McLean called, leaving the message that he had no response but would call again on September 18th. When McLean did not respond on the 18th, Stewart sent him a telegram on September 23rd. It read:

"On Monday September 14, 1987, I telephoned yourself and expressed what I thought were workable options for the resolution of the strike. You seemed interested but said you would have to check the ideas with your superior. You said you would call me on Wednesday Sept.

16th which you did, leaving a message that you would get back to me on Friday September 18th. As of this writing, I have not heard from you. Your actions would seem to indicate that Crane Canada is making little or no effort to resolve the current strike of the members whom we represent."

12. In response, McLean called, calling the telegram "hostile". He apologized to Stewart for not calling on September 18th but said he was busy with arbitrations. When Stewart asked him if he'd given any further thought to his ideas, McLean said that he had not, but would check with his superior and let Stewart know the results. He never did.

13. On October 5, however, McLean did call Stewart to advise him that because he was sick, he was unable to attend the meeting instigated by the Conciliation Officer for the next day, October 6. He told Stewart he would be sending Jacques Morissette in his place, Morissette being his "right hand man" and the Regional Personnel Manager for Crane in Brantford. Morissette was with both the Valve and the Plumbing Divisions but had never been involved with the Supply Division. Stewart asked McLean if Morissette had authority to resolve the issues and McLean replied affirmatively, thereby persuading Stewart that there was no point in delaying the meeting.

14. At the October 6 Conciliation Meeting, Morissette and Dixon attended for the company, while the union added the president of Local 419 to their usual team of Stewart and Bouillon. Morissette presented a document on wages he had received the day before in Montreal during a 30-45 minute meeting with McLean. Although the proposal was to a certain extent based on Stewart's suggestion of a wage grid, the grid extended over 48 months even though the parties had agreed that the term of the agreement would be one year. The company proposal represented no change in dollar amounts for 5 of the employees, and an improvement for another. Bouillon remained red-circled, and one more employee was now red-circled for the first time. In the union's view, and based on some informal research they had done, the proposed wages were significantly less than those paid in similar union and non-union businesses. Moreover, almost half of the 12 bargaining unit members would end up getting less take-home pay than they did before they were unionized. Nor was retroactivity or a signing bonus proposed by the company.

15. When Stewart asked Morissette about other outstanding issues, such as information on the company's Health and Welfare Plan, severance pay, union security, or sick leave, Morissette said that he knew nothing about them. It was his understanding that the only issue left to be negotiated was the wage package, and it was the only one about which he had any information.

16. In response to the company's wage offer, the union modified its wage proposal by 40% from its original position, agreed to the company's Health and Welfare Plan at an hourly cost of 8 cents-10 cents, even though it had still not received any details from the company about the extent of coverage, agreed to the company's proposal that sick leave continue under the existing corporate practise, reduced its request for a shift premium from 50 cents to 25 cents per hour, but retained its request for a union shop and a signing bonus of \$500.00. It was the union's understanding that Morissette would respond to their new proposals within 2 days. At the conclusion of the meeting, the union vigorously protested the company's conduct and considered themselves 'blind-sided', particularly in the face of having made such substantial concessions. Stewart told the company he felt he had no alternative but to bring a first-contract application.

17. Not having heard from Morissette or anyone else responding to the union's latest proposals, Stewart instituted these proceedings and personally delivered the documents to Dixon on October 22. Later that week he received a letter dated October 23 from Morissette confirming the company's position of October 6th and, in what appeared to Stewart to be a curious reference, asked Stewart in the post-script of the letter to disregard a previous letter dated October 7th. Ste-



wart had never received the earlier letter. He only later learned that Morissette, about to leave on 3 weeks' holiday, had given the letter to Dixon for delivery to Stewart. Hall, who received a copy from Dixon, told him not to send the October 7 letter to Stewart because he disagreed with its reference to an agreement on sick leave. In Hall's view, this was an erroneous assumption, and the letter was therefore changed by Morissette when he returned from holiday on October 23, deleting reference to sick leave. Morissette was not told until the end of October that Stewart had not been sent the October 7th version. He never offered the union any explanation for the change between the October 7 and October 23 letter.

18. Crane has three divisions - Supply, Plumbing and Valve. For the past 12 years, Robert Hall has been in charge of the Supply Division, which employs 570 to 1600 employees working for Crane across Canada. Although Doug McLean, as Crane's Director of Industrial Relations, normally negotiates for the company, Hall explained that when these negotiations started, McLean was unavailable to attend because he was conducting negotiations in New Brunswick and Quebec. McLean had also been in failing health for 1-1/2 years and, in fact, due to his illness, eventually took early retirement at the beginning of December, 1987. Hall had never before negotiated a collective agreement but was responsible for ensuring that this one proceeded in "an orderly way" until McLean could step in. The overall authority was to rest with the company president, Gordon Kelly, based on Hall's recommendation. Hall said that he went over the union's proposals with McLean but acknowledges that he spent very little time with him.

19. According to Hall, the company refused to present its wage proposal to the union on June 30th because of the union's insistence on a proposal that there be paid sick days, even though the union had modified its proposal from 18 to 6 paid sick days. Sick leave plans do not exist in any of Crane's 8 collective agreements, and the company practice was that sick pay was in the discretion of branch managers for the first 4 days. Otherwise, Crane had no paid sick leave policy anywhere in Canada. Hall admits that the union's "adamance" on sick leave caused him to decide not to put the company's wage package on the table on June 30th and that the meeting broke up as a result. It is worth noting that although the union did not modify its sick leave proposal before the next Conciliation meeting, (it did not accept the company's proposal until the October 6th meeting), Hall nevertheless presented the company's wage package at the very next meeting on July 22.

20. The company's first wage proposal on July 22, according to Hall, represented for most bargaining unit members a wage increase of 5.5% (or a \$400.00 annual increase) "albeit 4 people were being red-circled". Hall admitted that he was well aware that red-circling Bouillon would give him less take-home pay but said this was only a first offer and could change. The red-circling of Bouillon never did change during negotiations, although on November 12, 1987, the company put \$3,000.00 on the table for retroactivity pay to be distributed by the union in its discretion, and said that it expected that in its distribution of this money, the union could resolve any inequities it felt existed for Bouillon.

21. Hall explained that although McLean was too sick to attend the July 22nd meeting, he was sufficiently better to attend the next one on August 26th. The only discussion Hall had with McLean before this August meeting to review the wage proposals and outstanding issues lasted 1-1/2 hours. It was Hall's expectation that thenceforth McLean would continue with the negotiations. When McLean advised him 2 days before the October 6th meeting that he was too ill to attend the meeting, Hall approved Morissette as the replacement. According to Hall, he never saw the union's subsequent wage proposals or even discussed them with McLean or Morissette until after the union brought this application.

22. Of Crane's 8 collective agreements, 3 are in Ontario at Stratford, Brantford and Tren-

ton, but none are in Crane's Supply Division. A collective agreement had been in operation in a Supply Division in Vancouver but this branch was closed in 1983. Moreover, there was an attempt to negotiate a collective agreement with the Teamsters in a Supply Division branch in Hamilton in 1983 but no agreement was ever reached. Hall's involvement in the Vancouver agreement and the negotiations in Hamilton was "very little", although he did have discussions with the then manager of the Hamilton Branch, Crane's President, and Doug McLean during the Hamilton negotiations. The company's first proposal to the union in the case before this panel of the Board was modelled on the proposals to the Teamsters in Hamilton in 1983. Hall was involved, after discussions with others in Crane, in designing the company's January, 1987 proposals.

23. Although Hall did not consult with Kelly before attending any of the negotiating sessions in this case, he said that his goal was uniformity of contracts and to ensure that nothing agreed to would have an adverse effect on other contracts at Crane. Yet he admits that before developing the company's January proposals, he did not review the terms of the 3 other existing collective agreements in Ontario. These agreements contain provision for shift premiums ranging from 25 cents - 35 cents, and Hall admitted that it was "traditional" to pay shift premiums in union contracts. He considered the union's 50 cent shift premium (later modified to 25 cents) too 'gilt-edged', particularly because he felt that in agreeing to pay shift premiums to members of this bargaining unit, and notwithstanding the current existence of shift premiums in the other Ontario agreements, Crane would have to pay it to all the 250 comparable non-union employees in the Supply Division on the basis that it was, according to Hall, Crane's policy to "treat Crane employees the same, whether they're union or non-union". Although Hall admits that he thought shift premiums were an "inevitable" part of the agreement, he did not give Morissette authority to negotiate them because he felt it was "just a fluffy" item.

24. Morissette, in fact, was only given authority to present a final wage scale, with no authority to modify it, but some to redistribute it to account for benefit adjustments. He was given no instructions on shift premiums, signing bonuses, union security or sick leave. Morissette flew to Montreal the day before the October 6 meeting to meet with McLean for no more than 45 minutes and received no information or documentation from McLean other than a page outlining the company's new wage scale. He was told that everything but the wage package had already been agreed to. He was also told that the money offered was "in line" with the other branches in Crane's Supply Division, none of which are unionized. He knew there was an ongoing strike but was not aware of how long it had been continuing. Neither he nor McLean had received from Hall copies or notes of the union's proposals, nor did Morissette have any way of knowing whether the union's October 6 proposals represented any, let alone a 40% movement in their position on wages. He was not aware of what had occurred during previous negotiations or who had offered what to whom. Morissette neither consulted with nor talked to Hall (nor did he even know Hall was involved in these negotiations) until November 12, and Hall never knew until he read it in the pleadings that the union expected to hear from Morissette 2 days after the October 6th meeting. According to Morissette, the union's assertion that they would apply for a First Contract direction lead him to believe that his responsibilities were over, that negotiations had "broken down", and that the matter was back in McLean's hands. He advised McLean on October 7 of the events of the October 6 meeting, but did not discuss with him whether negotiations should continue.

## THE LAW

25. The relevant portions of section 40a are:

40a.-(1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minis-

ter has released the report on a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.

(2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;
- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.

It is the union's position that the process of collective bargaining has been unsuccessful because of the failure of the company to make reasonable or expeditious efforts to conclude a collective agreement, in accordance with section 40a(2)(c). In the company's view, the process of collective bargaining is not complete, and a direction, therefore, from the Board to settle a first collective agreement is premature at this time.

26. The contention that the process of collective bargaining should be "allowed to take its full course" has been accepted by this Board (*Teledyne Industries Canada Limited*, [1986] OLRB Rep. Oct. 1441). The very fact of a First Contract application is representative of at least one party's view that the process has been unsuccessful. It therefore falls to the Board in each case to assess the process to determine whether it is in fact unsuccessful, bearing in mind the realities of that process. One party's lack of success at any point in time may well be another party's legitimate but temporary bargaining tactic. It is true that section 40a is remedial legislation, but it is equally true that it was not meant to supplant the primacy of collective bargaining (*Nepean Roof Truss Limited*, [1986] OLRB Rep. July 1005).

27. In the case before us, we are satisfied not only that the process is unsuccessful, but has sufficiently run its course for us to conclude that there is a causative link between the breakdown of the process and the company's failure to make reasonable or expeditious efforts to conclude a collective agreement. The company's refusal to present a monetary package on June 30 because of the union's demand for sick leave, notwithstanding the union's modification from 18 to 6 days; its insinuation of McLean and Morissette into the process at crucial times, giving neither complete information nor authority to negotiate the several outstanding issues; McLean's inability or refusal to respond to the union's revised proposal after the August 26 meeting; Morissette's almost total lack of knowledge about the preceding sessions; Hall's general refusal either to inform himself of terms already agreed to in other Crane collective agreements, and his reneging in October on his own proposal on sick leave tendered on July 22 and accepted by the union on October 6, lead us to conclude that the company's efforts were neither reasonable nor expeditious once the negotiations entered the monetary phase and that bargaining was unsuccessful as a result of this conduct.

28. Although we are aware that McLean's illness and other commitments made him incapable of the primary role he would otherwise have had, his recurrent incapacity was known to the company for one and a half years. Had Crane been serious about meaningful bargaining, McLean would have either been replaced, or at least replaced from time to time with informed bargainers who had the appropriate negotiating authority. Even when McLean did finally appear at a session



on August 26th, he had not been adequately briefed, provided with necessary documentation, nor given the mandate to attempt to conclude an agreement. It is not enough to present a physical body at scheduled sessions at a bargaining table to be able to argue that reasonable efforts are being made. To escape the attribution of dilatory or unreasonable bargaining efforts, it is important that the bargaining representative know the process - its history and its parameters - and be able to participate meaningfully in attempting to conclude an agreement (*Mansour Rockbolting Limited*, [1986] OLRB Rep. Oct. 1346).

29. The test of what is reasonable or expeditious is an objective one, not simply one party's personal belief that it has executed its bargaining functions adequately in accordance with its own expectations (see *Formula Plastics Inc.*, [1987] OLRB Rep. May 702 dealing with an application pursuant to section 40a(2)(b)). There is no doubt that the company was entitled to attempt to restrain the union's wage demands, or, as the need arose, to replace negotiators when circumstances made it unavoidable. But using any objective standard, it was neither reasonable nor expeditious to bring to the negotiations, consistently and consecutively, company negotiators who were ill-prepared, lacking adequate bargaining authority, or were unequipped or unwilling to contribute to the incremental process bargaining necessarily entails.

30. It is not a question of whether the company intended deliberately to harm the process - there is no prerequisite for an antipathetic animus in entitlement to access to section 40a directions. Nor is it a question of the company simply hard-bargaining in attempting to provide wage parity between union and non-union employees - conduct which may not be violative of section 15 may nevertheless trigger first contract arbitration under section 40a (*Nepean, supra*). And, finally, it is no defence to a section 40a application, as the company argued, that what the company offered in wages was no less than what would likely be awarded in the terms of a First Contract under the Act - the test is whether the bargaining was unsuccessful because of any of the enumerated grounds, not a speculative exercise in the possibility of ultimate arbitral approbation. It is not useful to speculate on what an arbitrator might do, or even on what further concessions in wages the union might have made had they been faced after June 30th with informed, authoritative negotiators who were willing to negotiate meaningfully about other outstanding contract proposals. The union had persistently made major concessions during the negotiating period, even over wages, notwithstanding the frustrations it faced, and it indicated no unwillingness to continue the process. It did, however, finally come to the understandable conclusion that the company's efforts ranged from superficial to obstructive.

31. In all the circumstances of this case, we are satisfied that the process of collective bargaining has been unsuccessful because the company failed to make either reasonable or expeditious efforts to conclude a collective agreement. The Board, therefore, directs the settlement of a first collective agreement by arbitration.

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**1990-87-R International Woodworkers of America, Applicant v. G. W. Martin Veneer Limited, Respondent**

**Bargaining Unit - Certification - Practice and Procedure - Applicant challenging the inclusion of an employee in the bargaining unit at pre-hearing vote meeting with officer - Employee's ballot segregated and not counted - Vote tied - Applicant withdrawing challenge after vote - Employer then taking position that employee should be excluded from unit - Board determining that once applicant withdrew its challenge the employee was included in the unit - Party cannot raise a challenge after a vote has been counted**

**BEFORE:** *Patricia Hughes*, Vice-Chair, and Board Members *G. O. Shamanski* and *J. Redshaw*.

**DECISION OF THE BOARD;** January 19, 1988

1. In a decision dated December 21, 1987, the Board directed the appointment of a Labour Relations Officer to inquire into the duties and responsibilities of Jean Marc Fortin, whose inclusion in the bargaining unit had been challenged by the union. The respondent had included Mr. Fortin on the employee list it filed with the Board pursuant to Form 5 of the Board's Rules of Procedure. Its position that Mr. Fortin should be included in the unit had been confirmed at the Labour Relations Officer's meeting with the parties on November 9, 1987, held to obtain the necessary information to determine whether a pre-hearing representation vote is appropriate, and further confirmed in a letter to the Board dated December 2, 1987. (Mr. Fortin himself on his own behalf and on behalf of certain other employees filed a statement with the Board opposing the union and seeking a vote. The only effect a petition might have is to lead the Board to order a vote in cases in which the Board would have normally certified without a vote because of the extent of the support enjoyed by the union according to the documentary evidence filed. Since the applicant in this case requested a pre-hearing vote, the petition could not have any effect and therefore it was not considered by the Board.) Mr. Fortin had cast the single segregated ballot in the pre-hearing representation vote directed by the Board by decision dated November 12, 1987. That vote had resulted in a tie and therefore were Mr. Fortin found to be included in the unit, his vote would not be counted and a new vote would be ordered.

2. The Labour Relations Officer so appointed arranged to meet with the parties on January 7, 1988. Prior to that meeting (in a telex dated January 5, 1988), the applicant withdrew its challenge to the inclusion of Mr. Fortin in the unit. The Officer cancelled the meeting. By letter dated January 5, 1988, the respondent also changed its position, stating that "on further examination of the lead hand position it was our intention to present information at this meeting which would show that the lead hand position should be excluded from the bargaining unit". There is no record that the respondent had communicated its new belief to the union or that it was aware of the applicant's withdrawal of its challenge; it therefore appears that the respondent anticipated attending a meeting at which both parties intended to present evidence supporting the same position.

3. The respondent had the opportunity to state its position, including a challenge to any employee, at the time of the Officer's meeting with the parties prior to the direction that a vote be held. A party may withdraw a challenge to a person's inclusion in the unit, but it may not begin to raise challenges after the vote has been counted. As the Board said in *Santa Maria Foods*, [1981] OLRB Rep. Nov. 1618, with respect to a party's requesting the Board to reconsider the composition of a bargaining unit after the Board has announced the count of employees in the unit and the union membership count,

7. The Board's Rules and the certification hearing are ordered precisely to avoid the mischief of either party gerrymandering the employee lists or the structure of the bargaining unit in such a way as to avoid or favour certification, as the case may be. Pursuant to Form 3 of the Board's Regulations an employer is required to provide to the Board, not later than the terminal date, complete lists of employees in the bargaining unit proposed by the union on the date of application. The late filing of lists or the amendment of lists filed can be only by leave of the Board pursuant to its discretion under sections 82 or 83 of the Rules of Procedure.

8. ... Without these general rules certification hearings would be endless meanderings without map or compass, each turn in the journey being dictated by changing perceptions of the parties as to what best serves their own interests. That is why, absent extraordinary circumstances, the Board does not entertain submissions on the structure of the bargaining unit or the list of employees in the unit after the point in the hearing when the count has been given.

(Also see *The Corporation of the Township of Kingston*, [1975] OLRB Rep. April 370.) Although the comments in *Santa Maria Foods*, *supra*, were made in the context of a "regular" certification application, the rationale underlying the refusal to entertain the parties' requests in that case applies equally to applications in which a pre-hearing vote has been requested. While the Board in this case could again appoint a Labour Relations Officer to inquire into the duties and responsibilities of Mr. Fortin, and then either order another vote or dismiss the application, depending on the Board's determination of Mr. Fortin's status, it is our view that the most appropriate approach is the one we have taken. It is both expeditious and reflects the course the proceedings would have taken had the employer not included Mr. Fortin on the list. Once the union withdrew its challenge, Mr. Fortin is therefore included in the unit, just as if there had never been a challenge, as there apparently would not have been had the respondent not initially included Mr. Fortin on the employee list.

4. Accordingly, Mr. Fortin is included in the bargaining unit. His vote will not be counted, however, because to do so would reveal his preference. Therefore, the Board directs the taking of a second vote.

5. All employees of the respondent in the voting constituency on the date of this decision who are still employed in the voting constituency on the date the vote is taken will be eligible to vote. To be clear, Mr. Fortin is included on the voters list.

6. Voters will be asked to indicate whether they wish to be represented by the applicant in their employment relations with the respondent.

7. This matter is referred to the Registrar.

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**1269-86-R; 1271-86-R; 1272-86-R; 1278-86-R; 1279-86-R; 1280-86-R; 1283-86-R; 1286-86-R; 1287-86-R; 1290-86-R; 1291-86-R; 1292-86-R; 1293-86-R; 1843-86-R; 1845-86-R; Great Lakes Fishermen and Allied Workers' Union, Applicant v. F. Causarano Fishery Limited, Respondent; 1271-86-R Great Lakes Fishermen and Allied Workers' Union, Applicant v. C.P. Fisheries Ltd., Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant v. A. Figliomeni & Sons Limited, Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant v. Murray & Ken Loop Fishery Ltd., Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant v. Batista Fisheries Ltd., Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant v. Four Brothers Fishing Co. Limited, Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant v. H. Tiessen Fisheries Ltd., Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant v. James Taylor Fishery Ltd., Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant v. Simmons Fishery Ltd., Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant v. Harvey Getty and Sons Ltd., Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant v. Favignana Fishing Co. Limited, Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant v. 538391 Ontario Inc., Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant v. Family Fishery Company, Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant v. Philcox and Elsley Fishery Ltd., Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant v. S. Catrini Fisheries Inc., Respondent**

**Bargaining Unit - Certification - Whether sons of fishing boat owner who are also major shareholders excluded from bargaining unit - Being a shareholder or family member only leads to exclusion if managerial or confidential functions exercised - On-shore employees of fishing companies excluded from fishing boat crew units - Historical location of some fisheries leading Board to limit certificate to "in and out of" specific port - Other units described by reference to Lake Erie - Certificates Issuing**

**BEFORE:** *Patricia Hughes*, Vice-Chair, and Board Members *J. A. Rundle* and *J. Sarra*.

**APPEARANCES:** *Michael Darnell* for the applicant; *Brian P. Nolan*, *James N. Bartlet*, Q.C., *Jean L. Marentette* and *R. G. McLister* for the respondents.

**DECISION OF PATRICIA HUGHES, VICE-CHAIR AND BOARD MEMBER J. A. RUNDLE;**  
January 20, 1988

1. These files involve related issues and they were therefore put on for hearing at the same time. Each file is an application for certification in which certain outstanding issues about the bargaining unit remain to be decided by the Board.

#### **I. History of these files**

2. These matters constitute the remaining files of a group of twenty-seven applications for certification which the applicant Great Lakes Fishermen and Allied Workers' Union ("the union")

have filed with the Board: 1267-86-R, 1268-86-R (dismissed by decision of a partially differently constituted panel ["panel number 1"] dated September 4, 1986 and refiled as 1843-86-R), 1269-86-R, 1270-86-R, 1271-86-R, 1272-86-R, 1273-86-R, 1274-86-R, 1275-86-R, 1276-86-R, 1277-86-R (dismissed by decision of panel number 1 dated September 4, 1986 and refiled as 1844-86-R), 1278-86-R, 1279-86-R, 1280-86-R, 1281-86-R, 1282-86-R, 1283-86-R, 1284-86-R, 1285-86-R (dismissed by decision of panel number 1 dated September 16, 1986 and refiled as 1845-86-R), 1286-86-R, 1287-86-R, 1288-86-R, 1289-86-R, 1290-86-R, 1291-86-R, 1292-86-R and 1293-86-R.

3. In each case, the union had requested that a pre-hearing representation vote be held pursuant to section 9 of the *Labour Relations Act* ("the Act"). Panel number 1 directed the taking of pre-hearing representation votes in File Nos. 1267-86-R, 1269-86-R, 1271-86-R, 1272-86-R, 1274-86-R, 1276-86-R, 1278-86-R, 1279-86-R, 1280-86-R, 1281-86-R, 1282-86-R, 1283-86-R, 1284-86-R, 1286-86-R, 1287-86-R, 1288-86-R, 1290-86-R, 1291-86-R, 1292-86-R and 1293-86-R by decisions dated September 4, 1986 (the votes were held on September 20, 1986) and in File Nos. 1843-86-R and 1845-86-R by decisions dated October 20, 1986 and October 24, 1986, respectively (the votes were held on November 5, 1986). It permitted the union to withdraw its applications in File Nos. 1270-86-R and 1275-86-R and dismissed the applications in File Nos. 1273-86-R and 1289-86-R by decisions dated September 4, 1986, in File No. 1844-86-R by decision dated October 20, 1986 and in File Nos. 1276-86-R and 1281-86-R by decisions dated February 12, 1987.

4. The majority of the respondents objected to the taking of pre-hearing representation votes on several grounds, including the contention that the Board has no jurisdiction to hear these applications on the basis that labour relations between the crew of fishing boats or deck hands and their employers lies within federal jurisdiction; it was also contended by certain respondents that these employees were excluded from the Act by virtue of section 2(b) (on the basis they are engaged in hunting and trapping). The Board directed the votes and sealed the ballot boxes pending the resolution of these and other matters. Another panel, also in part differently constituted ("panel number 2"), determined that the Board has jurisdiction to hear these applications by decision dated December 9, 1986 (reported as [1986] OLRB Rep. Dec. 1691). (As a result, the ballot boxes were opened in the majority of the cases and the ballots counted; however, the ballot boxes in 1271-86-R, 1276-86-R, 1278-86-R, 1283-86-R, 1292-86-R and 1293-86-R remained sealed.) Certain other matters in dispute in File Nos. 1271-86-R, 1276-86-R, 1281-86-R, 1283-86-R, 1292-86-R and 1293-86-R were determined by panel number 2 in a decision dated February 24, 1987; the ballot boxes in 1283-86-R, 1292-86-R and 1293-86-R were subsequently opened and the votes counted. The parties were able to reach agreement on still other issues. In File No. 1267-86-R, the pre-hearing representation vote revealed that the number of employees desiring representation by the union and those not desiring such representation were equal, with one segregated ballot; panel number 2 therefore ordered another vote by decision of February 11, 1987; the union was not successful in that vote and that application was dismissed by decision of May 14, 1987. By decisions dated February 5, 1987, panel number 2 certified the union in File Nos. 1282-86-R and 1284-86-R, in each case for a bargaining unit described (on agreement of the parties) as "all employees of the respondent engaged in fishing on Lake Erie, save and except those above the rank of Boat Captain" ("the Lake Erie unit"). It certified the applicant in File No. 1288-86-R in decision dated February 11, 1987, for a bargaining unit described in the same way, again on agreement of the parties. File No. 1274-86-R actually involved two employers; in both cases, the union was certified by decision dated February 13, 1987, for the Lake Erie unit, on the parties' agreement.

5. The outstanding applications before this panel are 1269-86-R, 1271-86-R, 1272-86-R, 1278-86-R, 1279-86-R, 1280-86-R, 1283-86-R, 1286-86-R, 1287-86-R, 1290-86-R, 1291-86-R, 1292-86-R, 1293-86-R, 1843-86-R and 1845-86-R; the only remaining issues (with one exception relating to File No. 1271-86-R, set out below) are the geographical scope of the bargaining unit, the com-



position of the bargaining unit (specifically whether on-shore workers are to be included in or excluded from the unit) and the status of certain disputed individuals under clause 1(3)(b) of the Act. By decision dated November 4, 1986, panel number 2 had appointed a Labour Relations Officer to inquire into these matters and the hearing before us dealt with the parties' submissions relating to the Officer's reports of his inquiries.

## **II. Summary of the Issues**

6. In four of the cases, File No. 1272-86-R, A. Figliomeni & Sons Limited ("Figliomeni"), File No. 1280-86-R, Four Brothers Fishing Co. Limited ("Four Brothers"), File No. 1291-86-R, Favignana Fishing Co. Limited ("Favignana"), and File No. 1845-86-R, S. Catrini Fisheries Inc. ("Catrini"), the Board granted interim certification by decisions dated February 13, 1987 in the first three files and by decision dated April 9, 1987 in File No. 1845-86-R; the only matter outstanding is the geographic scope of the unit (the parties are agreed that the unit does not encompass on-shore workers) and the parties in each case submitted an Agreed Statement of Fact to enable the Board to determine the appropriate bargaining unit without an oral hearing. The respondents, taking the position that the geographic scope should be "the counties of Kent and Essex", made no submissions with respect to the Agreed Statement; the applicant made written submissions in support of its position in each file that the scope be "Lake Erie". In a decision dated June 12, 1987, however, panel number 2 indicated that "we are of the view that it is undesirable to determine the appropriate bargaining unit on the material before us" and directed that the parties be given notice of these hearings to permit them to make further submissions. The parties chose not to make additional submissions at these hearings, although counsel for each of the respondents in those four files did communicate through Gary McLister, counsel for certain of the other respondents herein, his position that the captains in those units be excluded and the fact that he took no position on the geographic scope. As indicated, the only issue in dispute is the geographic scope of the units; the units otherwise agreed upon excluded only "those [persons] above the rank of Boat Captain". At no time had these respondents taken the position that captains should be excluded until it was raised briefly through Mr. McLister at the September hearing; nor is there any evidence in these files in relation to that issue. Accordingly, we are not prepared to consider whether captains should be excluded and we limit our consideration of those four files to the question of the geographic scope, which question we address below in paragraph 49.

7. In File No. 1271-86-R, the respondent is C.P. Fisheries Ltd. ("C.P. Fisheries"); in File No. 1292-86-R, the respondent is 538391 Ontario Inc. ("538391"); and in File No. 1293-86-R, the respondent is Family Fishery Company ("Family Fishery"). Gary McLister represents each of those respondents. The parties agree on the description of the bargaining unit in Family Fishery: "all employees of the respondent engaged in fishing on Lake Erie, save and except boat captain and persons above the rank of boat captain"; the Board found that to be an appropriate unit in a decision dated April 29, 1987, in which it granted the union interim certification. In C.P. Fisheries, the parties agree that the bargaining unit should be described as follows: "all employees of the respondent engaged in fishing on Lake Erie, save and except boat captain and those above the rank of boat captain, and office and clerical staff" (see the September 4th decision in this file recording the parties' agreement at the Officer's meeting). The ballot box remains sealed in that file. In 538391, in which the union was granted interim certification by decision dated April 21, 1987, the parties disagree about the appropriate bargaining unit description: the union takes the position that the description should be "all employees of the respondent engaged in fishing on Lake Erie, save and except boat captain and those above the rank of boat captain and clerical and office employees" (the union had originally sought to include "boat captain" but the Board was informed of its agreement to the captain's exclusion at the hearing); the respondent contends the appropriate description is "all employees of the respondent engaged in fishing in Essex and Kent Counties, save and



except boat captain and those above the rank of boat captain and clerical and office employees". (The respondents in these three cases maintain that the description should be common for all files; the evidence of Vito Peralta with respect to the geographic scope of the unit, taken during the Officer's inquiry, applied to each of these three files.) In each of these files, the union takes the position that "on-shore workers" such as net menders, are excluded from the unit, while the respondents maintain they are included. In 538391, the union seeks to exclude part-time workers; at the hearing Mr. McLister informed the Board that the respondent no longer had any objection to their exclusion. (The Board is not bound by the parties' agreement, however; on the part-time employees issue, see paragraphs 16 and 17 below.) In addition, the status of Antonio Santos was in dispute, the respondent seeking his exclusion from the bargaining unit under section 1(3)(b) of the Act, the applicant arguing that he was an employee and should therefore be included; however, prior to the hearing the union agreed to his exclusion. There is one further outstanding issue in C.P. Fisheries which is not directly before us: in a letter dated February 6, 1987, counsel for the respondent has advised the Board of Rosaria Barracco's concern, expressed to the employer, that she was not on the voters list but believed she had a right to vote; she is an on-shore worker and therefore the resolution of this matter depends initially on whether on-shore workers are included in the C.P. Fisheries unit: if such workers are included, the issue of Ms. Barracco's entitlement to vote will be considered in a separate procedure.

8. Apart from the respondent in File No. 1283-86-R, H. Tiessen Fisheries Ltd. ("Tiessen Fisheries"), which was represented by Brian Nolan, the respondents in all the other files were represented by Jean Marentette and Richard Bartlet. In File No. 1278-86-R, Murray and Ken Loop Fishery Ltd. ("Loop Fishery"), File No. 1279-86-R, Batista Fisheries Ltd. ("Batista"), File No. 1287-86-R, Simmons Fishery Ltd. ("Simmons") and File No. 1290-86-R, Harvey Getty and Sons Ltd. ("Getty"), the outstanding issues are the geographic scope of the unit, the status of on-shore workers and the status of part-time workers: the union seeks the Lake Erie unit; the employers seek a unit described as "all employees of the respondent employed in its commercial fishing operation at Wheatley, save and except those above the rank of boat captain" ("the Wheatley unit"); the union seeks the exclusion of on-shore and part-time workers, the respondents their inclusion. In Loop Fishery the parties had originally disputed the inclusion of Kenneth E. Loop, Kenneth T. Loop, Murray C. Loop and Darlene Loop in the unit, but at the Officer's inquiry agreed that the first three individuals are excluded from the unit by virtue of clause 1(3)(b) of the Act and that Darlene Loop does not exercise any functions under clause 1(3)(b). In Batista, the original dispute over the status of John Batista is resolved by the parties' agreement that he is excluded from the unit under clause 1(3)(b). In Simmons, the parties are now agreed that disputed Robert Simmons is excluded from the unit under clause 1(3)(b). The status of disputed individuals Steve Getty and Barbara Getty was resolved by the parties' agreeing that Steve Getty is excluded under clause 1(3)(b) and that Barbara Getty, a bookkeeper, does not have a community of interest with the other employees. The ballot box remains sealed in Loop Fishery; in Batista, Simmons and Getty, the votes were counted, but the segregated ballots may determine the outcome in each case.

9. In File No. 1286-86-R, James Taylor Fishery Ltd. ("Taylor Fishery") and File No. 1269-86-R, F. Causarano Fishery Limited ("Causarano"), the only outstanding issue is the geographic scope of the unit, with the union seeking the Lake Erie unit and the employers the Wheatley unit; the parties are agreed that the units do not include on-shore workers. In Causarano, the parties are agreed that F. Causarano and John Causarano are excluded from the unit under clause 1(3)(b). The Board granted the union interim certification in Taylor Fishery and in Causarano by decisions dated February 11, 1987. In File No. 1843-86-R, Philcox and Elsley Fishery Ltd. ("Philcox and Elsley"), the geographic scope is in issue in the same manner as in Taylor Fishery; in addition, the status of Morris Elsley and Todd Elsley is disputed, with the union claiming their exclusion from the bargaining unit under clause 1(3)(b). The parties agree that James Elsley, previously in dispute, is

excluded from the unit under clause 1(3)(b). In Philcox and Elsley, the votes were counted, but the segregated ballots will determine the outcome.

10. The only matter remaining in dispute in Tiessen Fisheries is the status of John Tiessen and Timothy Tiessen, whose inclusion in the unit is challenged by the union on the basis that they exercise managerial functions or that they are employed in a confidential capacity. The parties previously disagreed about the status of Henry Tiessen and Louise Tiessen, but resolved that dispute by agreeing that both those individuals are excluded under clause 1(3)(b). The parties have agreed on the following bargaining unit description: “all employees of the respondent engaged in fishing the waters of Lake Erie, save and except those above the rank of boat captain”. In this file, the votes were counted, but the segregated ballots will determine the outcome.

### **III. Status of Morris and Todd Elsley and John and Timothy Tiessen**

11. We deal first with the status of Morris Elsley and Todd Elsley in the Philcox and Elsley file and with the status of John Tiessen and Timothy Tiessen in the Tiessen file.

12. The union’s representative, Michael Darnell, clarified that the union’s objection to the inclusion of both Morris Elsley and Todd Elsley was based on the confidential functions branch of clause 1(3)(b). That branch requires the individual to be “employed in a confidential capacity in matters relating to labour relations”. In this respect, Mr. Darnell referred almost entirely to evidence that both individuals receive a bonus above their portion of the crew share which is paid to all members of the fishing boat crews. He referred to no evidence, nor is there any evidence, indicating that either individual is in fact “employed in a confidential capacity in matters relating to labour relations”, as that phrase has been defined and applied in the Board’s jurisprudence: see *The Schneider-Link Office Employees’ Association*, [1987] OLRB Rep. March 381. There has been no “consistent exposure to confidential information on matters relating to labour relations so as to constitute such exposure an integral part of the employee’s service to the employer’s enterprise”: *York University*, [1975] OLRB Rep. Dec. 945. There was no evidence that either individual exercises managerial functions of any kind. We conclude that neither Morris Elsley nor Todd Elsley should be excluded from the unit under clause 1(3)(b). Accordingly, they are included in the bargaining unit and their votes are to be counted.

13. The union’s challenge to John Tiessen is based on its belief that he exercises managerial functions; it believes Timothy Tiessen exercises managerial functions and is employed in a confidential capacity relating to labour relations, although Mr. Darnell also stated that Timothy Tiessen is not involved in direct management of the company, but is employed in a confidential capacity because he owns 20% shares in Tiessen Fisheries. Mr. Darnell referred to portions of the evidence which indicate that John Tiessen discusses certain matters of hiring or changing the crew share with his father and portions indicating that as captain he has responsibility for the quality of the crew’s work and tells the crew what to do. He also owns 20% of the shares of Tiessen Fisheries. Having considered all the evidence, however, we conclude that neither John Tiessen nor Timothy Tiessen exercises any of the indicia of management: for example, they do not hire or fire or discipline; they do not make effective recommendations to their father who does hire, fire and discipline; they have no role to play with regard to the budget. (On the management tests, see, for example, *Hydro Electric Commission of the Borough of Etobicoke*, [1981] OLRB Rep. Jan. 38; *Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121.) John Tiessen is the “boss” on the boat, but at best he appears to have a “working foreperson” type of position, co-ordinating a crew who appear to know themselves what work they have to do. In sum, the evidence supports Mr. Nolan’s contention that Henry Tiessen, the father of John and Timothy Tiessen, runs the company



and that the best his sons can do is make “suggest[ions]” to him (that the company buy new equipment, for example).

14. Mr. Darnell made much of the fact that between them, John and Timothy Tiessen own 40% of the company and that their presence in the bargaining unit might conflict with that role in the company; in effect, Mr. Darnell is seeking to exclude them on the basis that they are significant shareholders who are members of the family owning the company. The union is concerned that it might be difficult to maintain a bargaining unit composed of only eight people, two of whom each hold a 20% interest in the company and are closely related to the individual who makes the decisions, and to prepare privately for negotiations in that context. Such concerns are understandable and it may be that such potential conflict of interest situations should be addressed by the Act. Under the current legislation, however, the Board has no authority to exclude on its discretion either shareholders or family members from a bargaining unit solely on the basis that they are shareholders or family members or both and whom the Board is satisfied that because of that position are in a conflict of interest position with the persons in the bargaining unit.

15. Conflict of interest must be addressed within the framework of clause 1(3)(b) of the Act. The jurisprudence makes it clear that being a shareholder or a family member results in exclusion only if that position leads the person to exercise managerial functions (or be employed in a confidential capacity). In *York Condominium Corporation #75*, [1975] OLRB Rep. July 534, two resident superintendents, who were among the four hundred owners of units, had access to confidential information with respect to the financial operations of the Corporation and voted on issues involving management of the property which the Board assumed would include matters affecting the employment relationship of the superintendents. The Board stated that it had to determine if ownership involves independent management functions; they found that while they might have been affected in their decision-making by their dual status, the two owners constituted an extreme minority of owners and therefore were unlikely to affect or undermine the decision-making of the Corporation. With respect to access to financial information, they were not *employed* in a confidential capacity. The Board said that if the owners were also directors (which is not the case with either John or Timothy Tiessen), the conclusion might be different, but in *S.D. Adams Welded Products Limited*, [1978] OLRB Rep. April 353, the Board clarified that being a director is not sufficient; again, the test is whether there is a conflict of interest *within the meaning of clause 1(3)(b) of the Act* between the individual's status as director and inclusion in the unit. An individual does not have to be a manager as such or hold a managerial position; the test is whether being a shareholder (or director) or family member involves performing duties and responsibilities which are considered managerial. A son of the owner-president of the company was included in the unit in *Hodgson Steel*, [1976] OLRB Rep. June 312 because he had never been effectively involved in the labour relations of the company and held no executive or management position. Nor was he *employed* in a confidential capacity. As the Board in that case said, the Act is silent with respect to persons who may experience a conflict of interest because of a familial relationship with a manager. In this case, neither John nor Timothy Tiessen exercise managerial functions either as managers or in their capacity as shareholders or as sons of Henry Tiessen; nor are they *employed* in a confidential capacity by Tiessen Fisheries. Simple access to confidential information is not sufficient to warrant exclusion. In addition, it should be noted that together they control fewer shares than does their father. Without statutory authority or obligation to exclude individuals, the Board must apply the underlying premise of the Act that employees are entitled to engaged in collective bargaining with their employer through their bargaining agent. The Board has not been given the discretion to exclude persons solely because the circumstances of those persons in the operation of the company might make it difficult for the union to carry out its mandate without fear their activities will be communicated to the owner. (Indeed, should inappropriate influence be affected by the owner through persons in the bargaining unit, the union has recourse to the unfair labour practices of the



Act.) Accordingly, we find that both John and Timothy Tiessen are included in the bargaining unit and direct that their ballots be counted.

#### IV. The Part-time Employees Issue

16. We next deal with the issue of the part-time employees. That issue was first raised by the union in a letter from its counsel to the Board dated December 4, 1986, which stated:

At the meeting in Leamington [sic] on November 28, 1986, convened by Labour Relations Officer, Peter Gallus, the issue of the composition of the Bargaining Unit was discussed formally for the first time, and it became clear that a number of the Respondents are seeking to include in the Bargaining Unit Net Menders and other Shore Workers.

The Union's position is that the Unit should consist of fishermen alone.

In the Unit originally proposed by the Applicants, being a Unit of Fishermen, there were no part-time employees, nor were there any summer vacation students, included, and therefore no exclusion was sought for those categories. If the Unit were to include persons other than Fishermen it may well be that there will be both part-time employees and summer vacation students in the Unit.

In view of the above it is the intention of the Union to seek the usual exclusion of part-time employees working less than 24 hours per week, and of summer vacation students.

17. Contrary to the suggestion in this letter, the issue of the composition of the bargaining unit was discussed formally some months prior to the November meeting, during the meetings held by Labour Relations Officers to obtain information and solicit the parties' positions on matters in dispute after the applications for the pre-hearing representation vote had been made ("pre-hearing meetings"). Those pre-hearing meetings were held in August 1986. The issue of whether the units were to include only the persons actually fishing on the boats or to include also certain employees working on-shore (repairing nets, for example) was raised by certain of the respondents. This is reflected in the decisions of the Board directing votes in these applications, referred to above. Accordingly, the position apparently taken by the union that it did not raise the part-time issue because the respondents did not announce their positions on the on-shore workers until November cannot be sustained in light of the Officers' reports of the pre-hearing representation vote meetings in which the parties' positions on that issue were recorded (and subsequently reproduced in the Board's decisions of September 4, 1986). The Board has stated that all issues which the parties wish to raise must be raised at the pre-hearing meeting: *Queen's University*, [1987] OLRB Rep. June 925. Furthermore, in this instance, the question of whether part-time employees and students are included in the unit is a standard question about the description of the bargaining unit and the description of the bargaining unit is, of course, basic to the certification application. In any case, not only was this issue not raised until after the pre-hearing meetings, it was not raised until after the votes had been taken and in some instances, the results revealed. The Board is not prepared to entertain submissions of this nature under these circumstances. Accordingly, we are not prepared to consider the union's submissions on the question of whether part-time employees are to be excluded from the unit. The unit descriptions do not explicitly exclude part-time employees who are therefore included. Any part-time employees actually included in the unit would be part-time employees engaged in the work done by the full-time persons in the unit. Since it appears that the only possible part-time workers (that is, those challenged on that basis by the union since there is no evidence before us directly on the point) are on-shore workers, therefore, whether the challenged individuals are included in the unit or not depends on our determination of the on-shore employees' status which we address below.

## V. The On-Shore Employees Issue

18. The determination of the composition of the bargaining unit -- which type of employees should be included in the unit -- involves in large part considering the degree of interest in common between or among groups of employees ("the community of interest"). The Board has, as a matter of standard practice, included certain kinds of employees together in a bargaining unit and excluded others. For example, in the industrial context the Board will usually certify a union to represent plant or production employees in one unit while certifying office, sales and technical employees in another unit. It is labour relations reality that these groups of employees usually have different interests regardless of where they are employed. Where a party can show the facts of a particular case depart from the norm, the Board may determine that a unit which also departs from the norm is appropriate, but it will not usually be necessary to substantiate that the standard unit is appropriate. Similarly, it may be possible for the Board to establish a "standard" composition for units in the fishing industry when it considers that it has sufficient knowledge of the industry to do so.

19. In *Usarco Limited*, [1967] OLRB Rep. Sept. 526, the Board set out the factors it considers in determining the appropriateness of a bargaining unit where employees are employed at more than one location; those factors have been applied, however, to situations in which employees are at the same location but appear to be exercising different functions. Those factors are as follows: the centralization of managerial authority; the economic effect of one or more bargaining units; the source of work; and the community of interest of employees, including the nature of the work performed, the conditions of employment, the skills of employees, the administration or managerial system, the geographic circumstance or location of the employees and the functional coherence and interdependence or interchange in the functions performed by the employees.

20. Where there is sufficient community of interest to make collective bargaining viable and where the separation of employees would lead to undue fragmentation, groups of employees are likely to be included in a single unit. Where separate units are sought, the impact of "neighbouring units" on the autonomy of the unit sought must be considered: *Board of Governors of Ryerson Polytechnical Institute*, [1984] OLRB Rep. Feb. 371, at paragraph 18. In this regard, the Board in *Ryerson Polytechnical Institute*, *supra*, commented that, although the Board

has been reluctant to establish units which are so broadly based that they defy organization[,...][t]he public policy of facilitating organization is a two-edged sword. A trade union may propose a unit defined so as to leave unrepresented a group so small that they have no real chance of entering the world of collective bargaining alone. In these circumstances, the Board expands the proposed unit to include the employees in question, even though the result may be to dilute support for the union to the point that the application is dismissed.

We must also consider the manner in which the union has organized this industry and "the desire of the employees on whose behalf the application has been filed to bargain collectively": *K-Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250. This latter factor is of particular import in cases such as those before us where the union is organizing an industry for the first time. Thus the Board is required to weigh the employees' freedom of choice, the viability of the proposed unit and the risk of fragmentation. It is not its responsibility to "minimiz[e] administrative problems for the employer or organizing problems for the union": *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, paragraph 17.

21. In applying these guidelines to the cases before us, we must remember that the union has in all cases organized only the crews on the fishing boats; those are the employees they sought to organize and those employees have expressed an interest in being represented by a union: it would appear that such is not the case with the on-shore employees. That reality of union organiz-



ing is not determinative of the question, but it must be weighed in the balance. We emphasise that the fact that the union has been successful in organizing one group of employees and not another is not the operative factor. The union's organizing pattern must be distinguished from the actual extent of support enjoyed by the union. We are also aware that where the parties have agreed on this issue, they have excluded on-shore employees from the unit. Such agreement is also not determinative of the Board's view of the issue, however: subsection 6(1) of the Act requires the Board to determine "the unit of employees that is appropriate for collective bargaining". We observe, in this regard, that the Board is not required to determine "the most appropriate unit"; more than one unit may be appropriate in a particular case (this is so not only with respect to the composition of the unit but also with respect to the geographic scope with which we deal below). We have had the advantage of reading the transcripts of the Officer's inquiries and of hearing submissions on those transcripts relating to the duties and responsibilities of the employees of seven different employers in the fishing industry. In our view, that provides an overview of the kind of work done by the crews on the boats and by the workers on shore, as well as the kind of interrelationship they generally have. Nevertheless, despite having evidence before us extending beyond any single case, evidence which we find to be similar in many respects, we emphasize that we must determine an appropriate unit for each case based on the particular facts of that case.

22. There are two net repairers employed by Simmons. Robert Simmons, the owner of Simmons, testified during the Officer's inquiry about the conditions of work of the repairers and crew. The net repairers repair nets which are worn out and put corks and leads on new nets. The crew, of course, work on the boats catching fish and bringing it back to the dock. The repairers work in the owner's building or in their own houses, while the boat crews work on the boats. Both groups work only when fishing takes place. Both kinds of employees are paid on what they produce; the crews receive a share of the catch and the net repairers are paid on a piece work basis. Mr. Darnell points out that the payment system reflects a significant difference in the nature of the work: the crew share is based on a system of pooled labour while piece work is an individual form of payment requiring no collectivization. The two kinds of employees receive the same legally required benefits and no others. While crew members are subject to the weather and may not be able to work every day, they appear to work regularly during the season, while there was only speculation on the part of Mr. Simmons about the hours of the net repairers who appear to have more discretion about when they actually work, as long as they complete the number of nets assigned. Although both jobs can be explained to employees in a couple of days, they both take months to acquire any significant skill. Mr. Simmons directs both groups. He testified that he has left crew members at home to work on nets when he needed nets in a hurry, but that that occurs rarely, perhaps once a year, and that none of the net menders has ever worked on the boats. No one has ever gone from being a net mender to fishing on the boats; nor has anyone ever gone from fishing to being a net mender. Mr. Bartlet argues that there is sufficient coherence to allow them to bargain together and that to certify only the crews, leaving open the possibility of a second unit composed of net repairers, would offend the policy against fragmentation. Furthermore, he contends, two persons would comprise too small a unit to function effectively. In our view, although they are subject to the same management, the work environment of the net repairers and that of the crew are different to the extent that each group can be said to have distinct collective bargaining interests. There appears to be little interchange between the two, either in the sense of "switching jobs" or in performing each other's functions on a temporary or *ad hoc* basis. On balance, despite the fact that there are only two net repairers employed by Simmons, there does not seem to be a compelling reason to depart from the union's organizing pattern in this instance: *Alltour Marketing Support Services Limited*, [1982] OLRB Rep. Oct. 1383. Accordingly, the on-shore workers are excluded from the unit. The ballots of Mary Ives and Cindy Hyatt, who the parties agree were the only net menders in the employ of Simmons on the application date, are not to be counted.



23. There are also two net repairers employed by Getty, Becky Conway and Tracey Johnston. Steven Getty, the President of Getty for three weeks prior to the examination and a captain since 1979, testified about the work of the repairers and the crew. There was similar evidence as that adduced in Simmons with respect to benefits, method of payment, management and work day. The repairers work in the garage of one of them. Mr. Getty stated that he would not go to one of the people on the boat if he were looking for a net stringer and he would not offer a net stringer the job if he were looking for a deck-hand. There are no circumstances under which a net mender would do the job of a deck-hand; however, last winter, the deck-hands worked one day a week for six weeks in the shanty doing the same thing as the menders (the menders worked in the employee's garage as usual), but he described that as a "very small, very small" percentage of the total work done by the deck-hands over the year. The deck-hands were paid by the hour, the menders on a piece-work basis. He testified that both sets of employees require good hand-eye co-ordination and, as did Mr. Simmons, that while neither job is difficult to learn, both require some time to achieve proficiency. For the reasons given with respect to Simmons, we conclude that the net repairers or menders are excluded from the unit; accordingly, the ballots of Becky Conway and Tracey Johnston are not to be counted.

24. In Batista, there was only one net repairer at the time of the application, Maria Julia Bichao. Again, the evidence given by Nick Batista, a deck-hand with the company and son of the owner, comparing the various factors, despite indicating that two deck-hands had done net repair work for about two weeks in the summer of 1985 while the boat was being painted, does not compel a departure from the union's organizing pattern. A single employee cannot form a bargaining unit by virtue of subsection 6(2) and therefore, where the employee has expressed an interest in collective bargaining, that employee will be included in the bargaining unit which will be described accordingly. In this case, however, the single net repairer has expressed no interest in collective bargaining and therefore we do not include her in the unit. Her ballot is therefore not to be counted.

25. The Loop Fishery is a more extensive operation than the others before us: there are five net repairers, one fish salesperson and two fish packers who are part of a business including boats and a small retail store. Murray Loop, one of the owners, gave evidence during the Officer's inquiry. One net repairer, James Lamb, was once a deck-hand and he has worked on the boats since becoming a net repairer for ten to fifteen days a year. No other net repairer or other shore worker works on the boats. The crew may be called in to do shore work one day a week during the winter, but this appears to be as much to give them an opportunity to make as much money as is compatible with collecting unemployment insurance as it is to serve the employer's needs. The crew might paint the boat, but on-shore workers do not, except that Mr. Loop "might get one of the kids to come down and help us or something a little bit". Some of the crew, and one individual in particular, might assist in unloading the catch; this is apparently on a voluntary basis. Mr. Lamb provides the only example of any kind of interchange and that is minimal, insufficient to reject the union's organizing pattern. In this case, the concern that the on-shore workers would have difficulty establishing a unit because there are too few of them does not arise. Accordingly, we find that the on-shore workers are excluded from the unit and the ballots of James Lamb, Marjorie Lamb, Darlene Loop, Scott Mummery, Kirt Pulloy, Maxine Scratch, Alberta Smith and Donald Smith are not to be counted.

26. Rosaria Barracco is the only net stringer purported to work at C.P. Fisheries, although there is a dispute about whether she was an employee at the time of the application or for the purpose of being included on the voters list. The evidence of Vito Peralta, President of C.P. Fisheries, indicated that crew members might do some mending of nets on the boat or on land during the winter amounting to ten or fifteen per cent of their total work. In a "typical year", a crew member

would be taken off the boat for one or two weeks to work on nets. Of the net stringing done for the company, “probably, of [sic] the top of my head ... 60, 40 [percent]” is done by crew members. He also indicates that “there have been numerous occasions where we use net stringers as fishermen”, about ten to twenty days in the year. When a net repair person is ill or a crew member is ill “it can happen” that they fill in for each other. Mr. Peralta spoke primarily in generalizations. But a female net mender has never worked on the boat; and the only net mender purported to be employed on the date of application is a woman. Neither job is highly skilled. Net menders traditionally have been members of crews and therefore are able to do both jobs. Mr. Peralta was not able to provide definite information about the payment of net menders. In fact, he indicated that he knew very little about the conditions of work of the net mender, since that is the captain’s responsibility. We do not include net menders in the unit. Although Rosaria Barracco is the only net mender, she has not expressed a desire for collective bargaining and therefore is not included in the unit. As stated above, the failure to include Ms. Barracco on the voters list has been brought to the Board’s attention by the employer. In his February 6th letter to the Board, counsel for C. P. Fisheries stated that Rosaria Barracco should be allowed to vote if we find she is an employee and has a community of interest with the crew on the boats. We have found the on-shore worker does not have a community of interest with the fishing boat crew and therefore it is not necessary to determine whether Rosaria Barracco was an employee of C. P. Fisheries at the relevant times, nor whether she was entitled to vote. Accordingly, the vote may now be counted in C. P. Fisheries.

## **VI. Geographic Scope of the Unit**

27. This is the first time the Board has been required to determine the appropriate geographic scope of a bargaining unit composed of the crews of fishing boats. As indicated above, in some cases both parties have proposed that the reference be to “Lake Erie”; certain respondents have taken the position that “at Wheatley” is appropriate; and other respondents have proposed “Essex and Kent Counties”. In all instances in which the parties have agreed to the description of the unit, the geographic scope has been “Lake Erie”. As we indicated with respect to the status of the on-shore workers, such agreement is not determinative of the Board’s view of the issue and as with the inclusion or exclusion of on-shore workers, we must determine an appropriate geographic description for each case based on the particular facts of that case.

28. Although the Board must always put its mind to the particular facts of the case before it, it has nevertheless established certain “standard” units in particular industries. The geographic scope most commonly applied is that of the municipality, as described in *Bruce Peninsula & District Memorial Hospital*, [1982] OLRB Rep. May 656, at paragraph 6:

[The Board’s “normal practice”] is to look at an appropriate unit in terms of the municipal boundaries within which a facility is located...This fairly rigid policy of the Board meets two concerns of the labour relations community: it provides an element of balance between the viability or rationality of bargaining units and the right to self-organize, and it provides a measure of predictability, along the lines of which parties can conduct themselves at the organizational stages of a certification campaign.

The Board in that case recognized that there are exceptions to that policy. It referred to *Adams Furniture Co. Limited*, [1975] OLRB Rep. June 491, in which the Board, although finding a municipal-wide unit to be appropriate in that case, indicated that there may be instances in which a regional bargaining unit will be appropriate; what is important is that the scope “be consistent with two basic considerations -- 1) the right of self-organization; 2) the requirement that collective bargaining relationships be viable”. Where the employer has more than one location in a municipality, the Board usually confines the description to the address of the location for which certification is actually being sought. But the general rule has been formulated to avoid “jeopardiz[ing] the stabil-



ity of the bargaining rights conferred upon the union", since reference to a particular location or street address entails the possibility that the employer could circumvent the unionization of its employees by moving its plant to another location: *T.R.S. Food Services Limited*. [1980] OLRB Rep. April 542. In *Dynamic Closures Limited*, [1983] OLRB Rep. April 521, the Board concluded that the unit should be described in terms of counties because the employer intended to relocate its plant in Cornwall to two plants then being built outside Cornwall: "where a relocation is intended at the time of the certification and the new site is within the labour market of the existing site, the bargaining unit should be described to embrace the planned move".

29. Certain industries do not readily lend themselves to municipal descriptions, however, and in such instances the Board recognizes that the "standard" geographic description may be different from the municipal scope common in industrial locations where the employer operates in a fixed location. Most obviously, where the employees do not actually work in or do not always work in that location, as in the case of truck drivers or travelling salespeople, the description will include the words "in and out of" (see *Brantox Holdings Ltd.*, [1969] OLRB Rep. Aug. 609) or "employed and working out of" (see *Livingston Transportation Ltd.*, [1975] OLRB Rep. July 568), reflecting the fact that the employees may be "on the road" but still working for the employer located at a central location to which they return or report. Construction units are quite distinct, referring to the relevant Board Area or to the Province, depending on whether bargaining rights are sought in the industrial, commercial and institutional sector of the construction industry or not.

30. Thus to the general principles of viability and self-determination we must add the nature of the industry as a factor relevant to the determination of the appropriate bargaining unit. We have been given information about the kinds of businesses operated by ten different employers in the fishing industry. That has provided us with a basis on which to formulate conclusions about the manner in which the fishing industry around the Windsor area functions, since, while clearly each business enjoys distinct characteristics, these employers also share significant characteristics in common. For example, while the size and duration of the businesses vary, they are all subject to the government's quota system which requires them to obtain licences in order to fish and the rules pertaining to the mobility or portability of such licences are the same for all the boat owners. In a letter dated October 2, 1987, Ms. Marentette, counsel for several of these respondents, articulates their view that it would be inappropriate for the Board to make "a positive effort to create a common description throughout the various files", since these are unrelated employers with no history or practice of collective bargaining. That letter was distributed to the other parties for their comments. Mr. McLister advised the Board of his position in a letter dated October 29, 1987, although it appears that he has misunderstood the point at issue. Mr. McLister opposes an industry-wide unit. There has never been a suggestion from any quarter that it would be appropriate to establish an industry-wide unit. Rather, the Board commented at the hearing that it might be appropriate to establish a standard bargaining unit description since the fishing industry is being newly certified. In fact, it has not been possible to establish such a description in the circumstances of these applications.

31. These respondents operate out of the port of Wheatley which is located on the border of Essex and Kent Counties. Some of them also dock for short periods in Kingsville and Erieau; Kingsville lies in Essex County and Erieau in Kent County. Elgin County lies east of Kent County and east of Elgin is the County of Haldimand-Norfolk.

32. In 538391, the owner seeks a geographic scope defined by the Counties fished by it. In C.P. Fisheries and Family Fishery, the parties agreed that the geographic scope of the unit should be "Lake Erie"; in submissions dated May 19, 1987, however, Mr. McLister acknowledged those agreements but went on to state that in each case, "the employer believes this should be limited to



the Counties of Essex and Kent in which this commercial [sic] fishing tug will operate". The Board found the Lake Erie unit to be appropriate with respect to Family Fishery in a decision dated April 29, 1987 and granted interim certification to the union for that unit. No reference was made to that decision by the parties. Mr. McLister takes the position that the geographic scope should be the same for all units and since the applicant agreed to the adducing of evidence at the Officer's inquiries in these files in relation to the geographic scope, and did not object to our considering that evidence even with respect to the agreed-to descriptions, despite the scope having already been agreed to, we are prepared to consider Mr. McLister's submissions on this matter. (In addition, the respondents in the four cases in which there was an agreed Statement of Fact, Figliomeni, Four Brothers, Favignana and Catrini, also took the position that the scope should be restricted to the counties; these cases are considered separately below.) Mr. McLister argues that while it is accurate to say that the boats fish the waters of Lake Erie, the description sought by the union, such a description is imprecise since they do not fish all Lake Erie; furthermore, the deckhands work on land (we have found such work, where it occurs, to be a very small part of their total work).

33. The evidence shows that the "Ilda C.", belonging to 538391, has historically fished only one licence and that is for Kent County. The "F.B. Clay", owned by Family Fishery, has also historically fished a Kent County licence and there is no evidence of any intention to change that. Although the "F.B. Clay" has also fished a Huron County licence, it no longer does so because of the cost of and time involved in transferring the crew to Grand Bend, a port on Lake Huron located in Huron County; that licence has been leased out on a gradual basis since 1984. The boat owned by C.P. Fisheries is the "Mummery Bros."; it originally had a Kent licence which was sold to the shareholders of Family Fishery and has been used on the "F.B. Clay" since 1981; the "Mummery Bros." fishes an Essex licence which had been purchased prior to the boat and which has been on the boat since 1978. The companies do not own the licences; rather they are owned by individuals. All these boats have at times been leased licences by other boats. There are not plans to purchase new licences, nor is there evidence of an intention to transfer licences. It was admitted by Mr. McLister that the licences can be changed, but it was contended that that would not change the business in any significant manner. Although there are three fishing zones, according to Vito Peralta, who as President of these three companies gave evidence common to all of them, (Kent, Elgin and Elgin-Norfolk waters), these boats fish only the waters of Kent and Elgin Counties. (We note that the testimony of John Causarano in File No. 1269-86-R names a fourth zone, Norfolk County, and the testimony of Steven Getty in File No. 1290-86-R, and of Robert Simmons in File No. 1287-86-R, refer to an area called "east of the Kent-Elgin line". We were not given sufficient evidence to determine Counties designated for licence purposes, although Ms. Marentette provided an Ontario map on which we could see the location of counties and ports.) We note that the map does not indicate an Elgin-Norfolk County, but does show a Haldimand-Norfolk County. Mr. McLister contended that the boats have a limited fishing range based on the county. None of the boats regularly operates outside the Leamington-Wheatley-Kingsville area, all of which ports are in Essex or Kent. Mr. Peralta testified that the port out of which a boat fishes does not have to be in the county designated on the licence (he cited as an example that a company can have an Essex County licence and fish from Wheatley; Wheatley is in both Essex and Kent Counties, but we have no information about where Wheatley is considered located for any "official" purposes, if that is different than Kent and Essex). He acknowledged that if the boat, specifically the "Mummery Bros.", "rented" quotas, it could go outside Kent and Essex Counties if the licence referred to another county (he indicated that it is illegal to "rent" licences, but that they can be sold). Apparently the "Ilda C." recently "rented" quota, but the evidence does not disclose when that was or where the boat fished for it. The "Ilda C." fished another licence last year which belonged to a fourth boat which was in dry dock.

34. The licences permit the owner of the licence (who is less likely to be the corporate

owner of the boat, than an individual family member, for example) to catch a specified amount of fish over the season which ends when the quota is filled. They are "attached" to counties: thus a licence may permit the owner to fish the waters of the County of Essex. It is the licences which give value to the business; the boats themselves are of little value in comparison to the licences. Mr. Peralta testified that a boat would hardly be worth selling without a licence. The owner sometimes leases or sells a licence and this may be more profitable than operating it himself or herself since the latter requires expenditures for the operation of the boat. The evidence indicates that it is not difficult to transfer licences to other owners or to other boats of the same owner; thus Boat A, which has a unionized crew, may carry a licence to fish the waters of Essex County; Boat B, owned by the same owner, may carry a licence to fish the waters of Elgin County. If the geographic scope of the bargaining unit on Boat A were confined to "the County of Essex", or even the Counties of Essex and Kent, the owner could transfer the licence from Boat B to Boat A and therefore eliminate the union's bargaining rights with respect to Boat A which would now be fishing the County of Elgin and not the County of Essex or the County of Kent. Tying in the geographic scope with the scope of the licences thus carries that risk. In some instances, a company might have licences covering various areas of the lake and these could be transferred from boat to boat. Alternatively, an owner may purchase quota - and the accompanying licence - from another owner and use crew in a bargaining unit described in terms of two counties to fish the quota in a third county. The apparent ease with which licences can be transferred makes us wary of describing the unit with reference to the counties, even though it appears that at this time these three boats all fish either Kent or Essex County and each owner seeks to have the unit described with reference to both counties. In determining the appropriate unit, particularly where the industry is being newly organized, the Board seeks to avoid foreseeable future difficulties where it can do so. Given a choice of more than one otherwise appropriate unit, the Board is likely to choose the one which is less likely to lead to or run the risk of problems which can be articulated at the time of the determination. We have sufficient concern that a geographical description based on the counties designated on the licences fished by the boats can lead to future difficulties; we have sufficient evidence before us to conclude that the ease with which licences can be transferred might well result in the union's having to seek certification for the same group of employees working on the same boat simply because the licence covering the county or counties named in the bargaining unit description has been replaced by one naming another county or counties. Accordingly, we reject a geographical referent based on counties; in each instance, there is an alternative description which contains less risk of elimination of the bargaining rights acquired by the union.

35. Alternatively, Mr. McLister took the position that the geographic scope for the units in C.P. Fisheries, Family Fishery and 538391 should be the municipality. The Ilda C., belonging to 538391, carrying a Kent licence, fishes primarily out of Wheatley and occasionally out of Erieau (both of which are in Kent County). The Mummery Bros., fishing an Essex licence and owned by Family Fishery, operates out of Kingsville (in Essex County) and sometimes out of Wheatley (Kent or Essex County). The C.P. Fisheries boat, the F.B. Clay, with a Kent licence, apparently fishes out of Kingsville and Wheatley, as well, although the evidence was not completely clear on this point. The boats have sheds located in the Leamington area and the head offices are all in Leamington.

36. The remaining respondents also all seek a unit described in terms of the municipality, specifically, Wheatley. Accordingly, these respondents adduced evidence of the location of their buildings, the length of time they had operated out of the Wheatley area and occasional instances of fishing in waters other than around Wheatley.

37. In Taylor Fishery, the evidence is that the company has been in Wheatley from its beginning fourteen or fifteen years ago. The shanty (for storage and repairing nets), boats and the



home of James Taylor, President of the company, are all located in Wheatley; the docking facilities in Wheatley are comprised of two tie-up slips rented by the year. It rents no other slips. Occasionally the boats dock at Erieau in Kent County, about three hours from Wheatley. The boats are dry-docked in Wheatley. The company fishes one Essex licence, two Kent County licences and one Elgin licence; the first two encompass 90% of the company's catch. The company has never held licences for any other counties. Kent and Essex Counties run down the middle of Wheatley, with the result that the vast amount of fishing time is spent in the waters around that town. The Elgin licence takes about two to three weeks to fish. The company has sold its fish, including the Elgin County fish, to McLean Bros., a processing company in which James Taylor owns shares, since 1975 (and part-time before that); it is located in Wheatley. There is no evidence of imminent relocation; on the contrary, the company has been in the Wheatley area for ten to fifteen years and its existing market is in the vicinity of Wheatley.

38. Causarano fishes Elgin and Kent licences, obtaining them in 1985 and 1972, respectively. Although John Causarano stated that the company uses the Elgin licence as an investment because it is too far out to fish, in fact it fished the licence in 1986, having rented it in 1985. It operates primarily out of the port of Wheatley, although of about 230 to 250 total fishing days last year, it fished out of Erieau for forty-five to fifty-five days because it fished the Elgin licence (presumably because Erieau is closer to Elgin than is Wheatley). John Causarano, President of the company, testified that the company spends most of its fishing time in Wheatley "because we are based in Wheatley and if you are going to fish in any other harbour you are going to run more expensive, you know travelling expenses and it is more expensive for us to fish in any other different harbour". Ms. Marentette stated that even when a company fishes out of Erieau, it would be covered by a certificate defined with reference to Wheatley since the company would still be based in Wheatley.

39. Simmons rents two berths in Wheatley on an annual basis. It has used a building (a shanty) at the home of Robert Simmons, the owner of the company, in Wheatley for twelve years and has never used facilities outside Wheatley. It has one Kent and two Essex licences; about ninety to ninety-five percent of the fishing time is in the immediate vicinity of Wheatley. Over the fifteen years, it has fished out of Wheatley 98% of the time. On occasion, it has docked at Kingsville and at Erieau, but "it's on a very rare occasion that we do leave Wheatley". A licence for Erieau can be fished out of Wheatley. Mr. Simmons indicated he prefers the physical conditions of Wheatley, compared to either Kingsville or Erieau. The fish are processed at McLean Brothers in Wheatley. Therefore, it is cheaper to operate out of Wheatley: "if I move to Kingsville or Erie O [sic] I've gotta truck my fish back and forth or back I should say, and I've gotta transport myself and ... to and from Kingsville or Erie O [sic] ... quite a bit more cost operating other than Wheatley". In addition, it is necessary to be sure ice is available, while "[w]hen you come in to Wheatley, your processor takes your fish, gives you your ice, you put in in your ice-box, tie up to your own dock and go home". There is no evidence of relocation.

40. Getty operates under similar conditions. It has a berth in Wheatley and Steven Getty, President of the company, owns a home there. It also owns a twine shanty three quarters of a mile from Wheatley harbour. The Wheatley facilities have been used since 1967; the company has never used other facilities. The docking facilities are leased on an annual basis. The company fishes Essex and Kent Counties, within a fifteen mile radius of Wheatley, 95%-97% of the time. It uses McLean Brothers, in which a holding company owned by Mr. Getty holds shares, as its processor; the company is required to sell to McLean Brothers pursuant to a shareholders' agreement. There is no evidence of relocation although Mr. Getty stated in response to a question from Mr. Darnell "will there ever be a situation in the future where you can contemplate fishing [Elgin]" that "[i]f I found



a licence that was to my liking, that I bought, maybe yes”; he also testified that he had “no desires to [purchase an Elgin licence, or lease an Elgin licence] at this moment”.

41. Batista rents storage and dock facilities in Wheatley (the dock slip, rented annually, has been used for about eleven years), and owns a shanty and storage area in Leamington behind the Batista house. It owns one boat with a Kent licence (the only licence it has ever held); thus the majority of its fishing is done in the Wheatley area, within a ten or twelve mile (that is, one or two hours) radius. Its processors are Lake Erie Foods and Omstead Foods, both located in Wheatley. There is no evidence of intended relocation or of employees elsewhere. Nick Batista, who testified on behalf of Batista Fisheries, was asked by Mr. Darnell whether he would “ever contemplate fishing in any other areas or buying a licence [sic] for another area? ... would you ever rent one, lease one, buy one”; his response was “[w]e never have in the past so I don’t see why we would do it in the future”.

42. The Philcox and Elsley company rents a dock in Wheatley on an annual basis. James Elsley, owner of the company, has a house in Wheatley. The company docks in Kingsville occasionally, but has no regular berth there. It has a shanty in Leamington. It has both Kent and Essex licences and about 80% to 85% of its fishing time is spent around Wheatley. Philcox and Elsley has been fishing out of Wheatley for about thirty-two years. Mr. Elsley explained that the company uses Wheatley rather than another harbour because “we started there and we had Kent County licence and then we got the Essex County licence and it is just the port where we work at, that is my home town, that is the port”. The company sells its fish to McLean Brothers. Last years, the company fished out of Erieau for three or four weeks, the first time it had done so in seven years, because “there was fish that way so we went that way”. Mr. Elsley agreed that “depending upon how the fish are this year [he] could or could not be [in Erieau] this year”. There is no evidence of relocation or of other employees located elsewhere.

43. Loop Fishery owns three boats which dock primarily in Wheatley; one boat docks in Kingsville two or three weeks a year. Its dock in Wheatley is leased yearly. It owns a retail store, four twine buildings, net sheds, storage houses and packing and processing one mile south of Wheatley. It owns two Kent licences and one Essex licence, thus fishing mainly out of Wheatley; it has not fished out of Erieau for four years. There is no evidence of intended relocation.

44. Mr. Darnell, for the union, argued that fishing can be done only on the vessel and that a port reference is inconsistent with the facts of the industry. The question, he maintains, is not where the sheds are located, but where the primary function, commercial fishing, is performed. Ms. Marentette took the position that it is necessary to look at the entire commercial operation and that includes the physical plant on-shore. Furthermore, says Mr. Darnell, this is a living source, unlike the resources in mining and forestry; Ms. Marentette says that the resource has been located in the same general area for many years. She emphasized that the presence of the processing plant in the area is relevant to the viability of the operation. She points out that there are no other locations and no employees other than those at Wheatley and therefore the broader Lake Erie unit is inappropriate on the Board’s usual principles.

45. The evidence shows that the respondents in Loop Fishery, Taylor Fishery, Simmons, Getty and Philcox & Elsley have long-established businesses in and around the immediate area of Wheatley. (Philcox & Elsley has a shanty in Leamington but most of its operation is located around Wheatley). Their operations are centralized at Wheatley, even though they may occasionally dock elsewhere. The buildings owned by Batista are located at Leamington; it only rents facilities in Wheatley. We were given no evidence about the location of Causarano’s operation, nor the time it has been at Wheatley. Most importantly, the fishing crews leave Wheatley and return to

Wheatley, even when they temporarily dock elsewhere for short periods between leaving from and returning to their home port. A unit referring to Lake Erie would extend from Kent County at the western end to Niagara County at the eastern end. There is no evidence that any respondent fishes the entire coast of Lake Erie. We have concern that the employer certified at Wheatley might avoid the consequences of successful union organization by moving down the Lake Erie coast; on the other hand, there is often the potential for the same result in the industrial setting and yet the Board has resisted the temptation to certify beyond the municipality. While it may be that it would be easier to move a fishing operation than it would be a factory, there is no evidence before us that this is the case, as there was evidence of the ease with which licences can be transferred. In the industrial context, however, it is the use of the municipality which is intended to protect the union against an employer who merely seeks to change addresses within the municipality. If the appropriate analogy is to see Wheatley as the “street address” and Lake Erie as the municipality, we would certify for Lake Erie.

46. Yet we are not justified in certifying for that area where we are satisfied that the employers have a long-standing attachment to Wheatley and have no plans to move the operation to another port. A limitation to Wheatley only, on the other hand, may raise debate about whether the certificate covers the crew when they spend three weeks fishing out of Erieau or some time fishing out of Kingsville, even though they originally left Wheatley and will return to Wheatley. It is our intention that the crews be covered by the certificate at such times. The intention is that where the employer is centrally located at Wheatley, but occasionally fishes out of another port for short periods of time (in other words, has not relocated the existing fishery to or opened a new fishery in Kingsville, Erieau or elsewhere along the coast), the crews will be covered by the certificate wherever they fish. Where we can foresee difficulties, we should attempt to describe a bargaining unit which eliminates or reduces them; but we cannot determine a description to avoid hypothetical or speculative problems about which we have been given no evidence. We have been given no evidence to indicate that any of these employers will relocate their operation and cease operating primarily from the Wheatley area (and where the union is of the view that an employer has moved its operations in order to avoid the certification, it has recourse to the Act), but we do have evidence that certain employers in particular fish temporarily out of other ports and of the ease with which an employer can fish out of other ports for short periods without relocating or significantly increasing the cost of transporting the fish to the processing plants.

47. In addition, there is evidence that some of these employers have buildings located just outside Wheatley and one, Batista, has a shanty and storage in Leamington. These buildings are part of the employer’s “commercial fishing operation”, leaving open for future dispute whether the crew would be employed “in the respondent’s commercial fishing operation at Wheatley” if all of the buildings connected to the operation are not actually at Wheatley. In our view, the fisheries of each of these employers are located at Wheatley; however, we were given no evidence about the geographical parameters of Wheatley. Confusion in this respect can easily be eliminated by using the phrase “all employees of the respondent employed in fishing” rather than in the respondent’s “commercial fishing operation”. This description makes it clear that no matter where a shanty or house may be located, the persons covered by the certificate are those fishing out of Wheatley and is particularly appropriate since only the crews are included in the bargaining units and not the on-shore employees. Accordingly, apart from Causarano, we accept that “Wheatley”, is the appropriate geographic reference, but instead of the proposed “at Wheatley”, we find that “in and out of Wheatley” is the appropriate description. This ensures that boats fishing out of Erieau or Kingsville on a temporary basis will be encompassed by the description (as was intended by the respondents, according to Ms. Marentette). To make our intention clear, we have added a clarity note based on the evidence before us in these cases. It also ensures there will be no dispute that the

crew are covered by the certificate even when in port (although there was no suggestion otherwise).

48. We do not have the kind of evidence about the historical location of the fisheries in the cases of Causarano, C.P. Fisheries, Family Fishery and 538391 which underlies our geographical description in Loop Fishery, Taylor Fishery, Simmons, Getty, Philcox & Elsley and Batista. Thus it is our view that the appropriate unit in those cases should encompass Lake Erie (and therefore sustain the parties' agreement in two of those cases). We are satisfied the applicant's proposed unit is appropriate.

49. Nor do we have sufficient evidence in Favignana, Catrini, Four Brothers and Figliomeni, to allay our concerns about the ease of transferring licences or of moving the operations. In all of four of those files the respondents chose not to make submissions on the appropriate unit. Panel no. 2 made it clear that the Board needed to hear the evidence in the other cases which were eventually scheduled before this panel before it could determine the appropriate unit. Having done so, and having considered the Agreed Statement of Facts submitted by the parties in those cases, and having considered the written submissions of the applicant, we find that the appropriate unit should encompass Lake Erie in those four cases.

## **VII. Summary of Findings of the Board**

50. *Board File No. 1269-86-R (Causarano):* The Board finds that

all employees of the respondent engaged in fishing on Lake Erie, save and except those above the rank of boat captain,

constitute a unit of employees of the respondent appropriate for collective bargaining.

*Clarity Note:* The Board notes the parties' agreement that on-shore workers are excluded from the unit.

On the agreement of the parties, F. Causarano and John Causarano are excluded from the unit pursuant to clause 1(3)(b) of the Act.

In its decision of February 11, 1987 in this file, the Board found that the applicant is a trade union within the meaning of clause 1(1)(p) of the Act; that decision also stated that the Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

All matters in dispute having been resolved, a final certificate shall issue to the applicant.

51. *Board File No. 1271-86-R (C. P. Fisheries):* The Board finds that

all employees of the respondent engaged in fishing on Lake Erie, save and except boat captain and those above the rank of boat captain, and office and clerical staff,

constitute a unit of employees of the respondent appropriate for collective bargaining.

*Clarity Note:* On-shore workers are excluded from the unit.

The Board further finds Rosario Barracco is not included in the bargaining unit.



The Board directs that the ballot box be opened and the votes counted by the Labour Relations Officer appointed by the Board with respect to this file.

52. *Board File No. 1272-86-R (Figliomeni)*: The Board finds that

all employees of the respondent engaged in fishing on Lake Erie, save and except those above the rank of boat captain,

constitute a unit of employees of the respondent appropriate for collective bargaining.

*Clarity Note*: The Board notes the parties' agreement that on-shore workers are excluded from the unit.

In its decision of February 13, 1987 in this file, the Board found that the applicant is a trade union within the meaning of clause 1(1)(p) of the Act; that decision also stated that the Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

All matters in dispute having been resolved, a final certificate shall issue to the applicant.

53. *Board File No. 1278-86-R (Loop Fishery)*: The Board finds that

all employees of the respondent employed in fishing in and out of Wheatley, save and except those above the rank of boat captain,

constitute a unit of employees of the respondent appropriate for collective bargaining.

*Clarity Note*: The Board notes that on-shore employees are excluded from the unit. The Board also notes, for purposes of clarity, that "in and out of Wheatley" is intended to encompass fishing carried out on an occasional basis from other ports on Lake Erie when Wheatley is the home port of the employees engaged in fishing out of those other ports.

The Board directs that the ballot box be opened and the vote counted by the Labour Relations Officer appointed by the Board with respect to this file. The segregated ballots are not to be counted. To be clear, any ballot cast by Kenneth E. Loop, Kenneth T. Loop, Murray C. Loop, James Lamb, Marjorie J. Lamb, Darlene Loop, Scott Mummery, Kirt Pulloy, Maxine Scratch, Alberta Smith or Donald Smith is not to be counted.

54. *Board File No. 1279-86-R (Batista)*: The Board finds that

all employees of the respondent employed in fishing in and out of Wheatley, save and except those above the rank of boat captain,

constitute a unit of employees of the respondent appropriate for collective bargaining.

*Clarity Note*: On-shore employees are excluded from the unit. The Board also notes, for purposes of clarity, that "in and out of Wheatley" is intended to encompass fishing carried out on an occasional basis from other ports on Lake Erie when Wheatley is the home port of the employees engaged in fishing out of those other ports.

The segregated ballots are not to be counted. Specifically, any ballot cast by John Batista or Maria Julia Bichao is not to be counted.

The Board finds that the applicant is a trade union within the meaning of clause 1(1)(p) of the Act.

The Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

The segregated ballots not being counted, upon the taking of the pre-hearing representation vote, more than fifty per cent of the ballots cast were cast in favour of the applicant.

Accordingly, a certificate shall issue to the applicant.

55. *Board File No. 1280-86-R (Four Brothers)*: The Board finds that

all employees of the respondent engaged in fishing on Lake Erie, save and except those above the rank of boat captain,

constitute a unit of employees of the respondent appropriate for collective bargaining.

*Clarity Note:* The Board notes the parties' agreement that on-shore workers are excluded from the unit.

In its decision of February 13, 1987 in this file, the Board found that the applicant is a trade union within the meaning of clause 1(1)(p) of the Act; that decision also stated that the Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

All matters in dispute having been resolved, a final certificate shall issue to the applicant.

56. *Board File No. 1283-86-R (Tiessen Fisheries)*: The Board directs that the segregated ballots are to be counted by the Labour Relations Officer appointed by the Board with respect to this file. The ballots of Henry Tiessen and Louise Tiessen are not to be counted. The ballots of John Tiessen and Timothy Tiessen are to be counted.

57. *Board File No. 1286-86-R (Taylor Fishery)*: The Board finds that

all employees of the respondent employed in fishing in and out of Wheatley, save and except those above the rank of boat captain,

constitute a unit of employees of the respondent appropriate for collective bargaining.

*Clarity Note:* On-shore employees are excluded from the unit. The Board also notes, for purposes of clarity, that "in and out of Wheatley" is intended to encompass fishing carried out on an occasional basis from other ports on Lake Erie when Wheatley is the home port of the employees engaged in fishing out of those ports.

In its decision of February 11, 1987 in this file, the Board found that the applicant is a trade union within the meaning of clause 1(1)(p) of the Act; that decision also stated that the Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

All matters in dispute having been resolved, a final certificate shall issue to the applicant.

58. *Board File No. 1287-86-R (Simmons)*: The Board finds that

all employees of the respondent employed in fishing in and out of Wheatley, save and except those above the rank of boat captain,

constitute a unit of employees of the respondent appropriate for collective bargaining.

*Clarity Note:* On-shore employees are excluded from the unit. The Board also notes, for purposes of clarity, that “in and out of Wheatley” is intended to encompass fishing carried out on an occasional basis from other ports on Lake Erie when Wheatley is the home port of the employees engaged in fishing out of those ports.

The Board directs that the segregated ballots are not to be counted. To be clear, any ballot cast by Robert Simmons, Mary Ives or Cindy Hyatt is not to be counted.

The Board finds that the applicant is a trade union within the meaning of clause 1(1)(p) of the Act.

The Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

The segregated ballots not being counted, upon the taking of the pre-hearing representation vote, more than fifty per cent of the ballots cast were cast in favour of the applicant.

Accordingly, a certificate shall issue to the applicant.

59. *Board File No. 1290-86-R (Getty):* The Board finds that

all employees of the respondent employed in fishing in and out of Wheatley, save and except those above the rank of boat captain,

constitute a unit of employees of the respondent appropriate for collective bargaining.

*Clarity Note:* On-shore workers are excluded from the unit. The Board also notes, for purposes of clarity, that “in and out of Wheatley” is intended to encompass fishing carried out on an occasional basis from other ports on Lake Erie when Wheatley is the home port of the employees engaged in fishing out of those ports.

The Board directs that the segregated ballots are not to be counted. To be clear, any ballot cast by Steve Getty, Barbara Getty, Becky Conway or Tracey Johnston is not to be counted.

The Board finds that the applicant is a trade union within the meaning of clause 1(1)(p) of the Act.

The Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

The segregated ballots not being counted, upon the taking of the pre-hearing representation vote, more than fifty per cent of the ballots cast were cast in favour of the applicant.

Accordingly, a certificate shall issue to the applicant.

60. *Board File No. 1291-86-R (Favignana):* The Board finds that

all employees of the respondent engaged in fishing on Lake Erie, save and except those above the rank of boat captain,

constitute a unit of employees of the respondent appropriate for collective bargaining.



*Clarity Note:* The Board notes the parties' agreement that on-shore workers are excluded from the unit.

In its decision of February 13, 1987 in this file, the Board found that the applicant is a trade union within the meaning of clause 1(1)(p) of the Act; that decision also stated that the Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

All matters in dispute having been resolved, a final certificate shall issue to the applicant.

61. *Board File No. 1292-86-R (538391):* The Board finds that

all employees of the respondent engaged in fishing on Lake Erie, save and except boat captain and those above the rank of boat captain, and office and clerical staff,

constitute a unit of employees of the respondent appropriate for a collective bargaining.

*Clarity Note:* On-shore employees are excluded from the unit.

In its decision of April 21, 1987 in this file, the Board found that the applicant is a trade union within the meaning of clause 1(1)(p) of the Act; that decision also stated that the Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

All matters in dispute having been resolved, a final certificate shall issue to the applicant.

62. *Board File No. 1293-86-R (Family Fishery):* The Board finds that

all employees of the respondent engaged in fishing on Lake Erie, save and except boat captain and persons above the rank of boat captain,

constitute a unit of employees of the respondent appropriate for collective bargaining.

*Clarity Note:* On-shore employees are excluded from the unit.

In its decision of April 29, 1987 in this file, the Board found that the applicant is a trade union within the meaning of clause 1(1)(p) of the Act; that decision also stated that the Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

All matters in dispute having been resolved, a final certificate shall issue to the applicant.

63. *Board File No. 1843-86-R (Philcox and Elsley):* The Board finds that

all employees of the respondent employed in fishing in and out of Wheatley, save and except those above the rank of boat captain,

constitute a unit of employees of the respondent appropriate for collective bargaining.

*Clarity Note:* On-shore employees are excluded from the unit. The Board also notes, for purposes of clarity, that "in and out of Wheatley" is intended to encompass fishing carried out on an occasional basis from other ports on Lake Erie when Wheatley is the home port of the employees engaged in fishing out of those ports.

The Board directs that the segregated ballots are to be counted by the Labour Relations Officer appointed by the Board with respect to this file. The ballot of James Elsley is not to be counted. The ballots of Morris Elsley and Todd Elsley are to be counted.

64. *Board File No. 1845-86-R (Catrini)*: The Board finds that

all employees of the respondent engaged in fishing on Lake Erie, save and except those above the rank of boat captain,

constitute a unit of employees of the respondent appropriate for collective bargaining.

*Clarity Note*: The Board notes the parties' agreement that on-shore workers are excluded from the unit.

In its decision of April 9, 1987 in this file, the Board found that the applicant is a trade union within the meaning of clause 1(1)(p) of the Act. The Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

All matters in dispute having been resolved, a final certificate shall issue to the applicant.

65. The Board hereby appoints a Labour Relations Officer to open the ballot box and count the ballots in File Nos. 1271-86-R and 1278-86-R, and to count the segregated ballots and finalize the counting of the ballots in File Nos. 1283-86-R and 1843-86-R.

66. A final certificate shall issue to the applicant in each of File Nos. 1269-86-R, 1272-86-R, 1279-86-R, 1280-86-R, 1286-86-R, 1287-86-R, 1290-86-R, 1291-86-R, 1292-86-R, 1293-86-R and 1845-86-R.

#### **DECISION OF BOARD MEMBER JANIS SARRA;**

1. I concur with the majority on most issues in this series of files. However, there are two areas in which I believe the majority has come to the wrong conclusion and I dissent from its decision. In my view, John Tiesson and Timothy Tiesson should have been excluded from the bargaining unit in File 1283-86-R, H. Tiesson Fisheries Limited. They are the sons of the owner, they own 40% of total shares in the company and in any event John Tiesson should be excluded because he exercises managerial functions. I also have some concerns about the bargaining unit description as found by the majority in File No. 1279-86-R, Batista Fisheries Ltd. and File No. 1843-86-R, Philcox and Elsley Fishery Ltd. It would make better labour relations sense in these files to give the Lake Erie bargaining unit description.

#### **MAJOR SHAREHOLDERS**

2. John Tiesson and Timothy Tiesson each own 20% of the shares in H. Tiesson Fisheries Ltd. Their father, Henry Tiesson, owns the remaining 60% of shares. The brothers are co-owners of the business and its principal assets, the quota and fishing license and the boat. They draw annual profit dividends from the company and they are involved, with Henry Tiesson, in the annual audit of the finances at the accountant's office. They have an ongoing, very direct and substantial economic interest in the company.

3. The majority's decision to include John and Timothy Tiesson in the bargaining unit places them in a conflict of interest position, and jeopardizes the ability of a small bargaining unit

to function. The majority's narrow interpretation of the exclusions under 1(3)(b) of the Labour Relations Act is inconsistent with the intent of the section and is contrary to decisions made by this Board in previous cases.

4. The purpose of exclusions under section 1(3)(b) is to ensure that employees in the bargaining unit are not faced with divided loyalties. Here we have two brothers, who hold 40% of stock in the company, conceivably in the position of collectively bargaining against their own interests across the table from their father who holds the remaining 60% of stock. The contradictions of such a situation should be obvious. They would be setting wage and benefit demands that would cut directly into the profits and dividends that they as major shareholders extract from the company each year. Including these two people in the bargaining unit creates a conflict of interest between their responsibilities as bargaining unit members and their responsibilities and economic interests as major shareholders.

5. The Board, in fulfilling our mandate to foster harmonious labour relations, is faced with the task of discerning where the interests of particular individuals lie; not only to protect their rights to manage or to join a union, but also to ensure that the process of collective bargaining will unfold with an arms-length relationship between the various interests. In this case the inclusion of John and Timothy Tiesson will undermine collective bargaining in this workplace of eight people.

6. There are two lines of cases regarding shareholders, those in which the Board has included in the bargaining unit the shareholders who hold a very small proportion of the stock, and those cases in which the Board has excluded major shareholders. This case falls within the latter category. In *Labourers vs. Massi Construction*, [1984] OLRB Rep. Feb. 284, the Board excluded a working foreman who it found was doing bargaining unit work but was a 33% shareholder and brother of the company's principle shareholder. In excluding him the Board said "Collective bargaining by its very nature, requires an arms-length relationship between the 'two sides' whose interests and objectives are often divergent." In the case before us, instead of allowing an "arms-length" relationship for these substantial shareholders, the Board is creating a conflict of interest or "arms-tied" relationship for John and Timothy Tiesson. It is difficult to see how such a decision makes labour relations sense.

7. The majority in this case relies upon *York Condominium Corporation #75*, (1975) OLRB Rep. July 534 in which the employees owned only two of 400 condominium units. In that case the Board made it clear that its concern was the conflict of interest and its characterization of that conflict focused on how small the percentage of shares was, leaving the door open for consideration of substantial shareholders. The Board said, at paragraphs 8 and 9:

In applying section 1(3)(b) the Board is concerned with significant conflicts of interest that might compromise the management of the employer's operation.

Applying this test to the resident superintendents, it can be said that their decision-making as unit owners may well be affected by their dual status as employees but because they are only two of 400 unit owners they are unlikely to affect or undermine the decision-making of the respondent corporation. Thus we would conclude that they do not exercise managerial functions as unit owners in any effective sense or in a way envisioned by section 1(3)(b) of the Act.

8. In the *H. Tiesson Fisheries Ltd.* case the issue is not the problem of compromising the operation of the company, but rather the other side of the same coin, compromising the functioning of the bargaining unit; something which in itself is illustrative of the interests of the two individuals in dispute. The majority also relies upon *Hodgson Steel* (supra) a case which does not have direct application because the employee was not a shareholder and had no direct financial interest



in the operation. *S. D. Adams Welded Products Ltd.*, (supra) also cited by the majority, falls in the line of cases where the Board has included those employees holding a small percentage of shares; the employee in question, Poirier, owned only 2 of 4,203 shares and attended one directors meeting annually.

## FAMILY TIES

9. The Labour Relations Act does not deal directly with the exclusion of family members from a bargaining unit because of conflict of interest. However, both the *Tiessons* and the case of *Morris and Todd Elsley in the Philcox and Elsley* file highlights the need for consideration of the Board's approach to such situations. In my view, the majority has too narrowly defined the Board's discretionary powers, and by doing so has ignored the test of community of interest. The role of the Board is to fashion bargaining units to reflect the various interests of employees in any given workplace and thereby establish a viable bargaining unit. In the case of *Morris and Todd Elsley*, although not directors or managers, the evidence establishes that their interests were considerably different from those of other crew members. Each of them receives an annual bonus of 1% of each year's catch only virtue of their family membership, income not given to any of the other crew members. They are privy to confidential information even though not employed in that capacity. The evidence indicates that their community of interest is with their father, the boat's captain and their grandfather, the company's owner. They distance themselves from the crew to the point that there was reference to ethnic bias. Their interests cannot be realistically found to be the same as the other crew members.

10. It is evident that in the past the Board has chosen not to exclude family members from a bargaining unit unless they exercise managerial authority or are employed in a confidential capacity. What is less clear is why the Board has not used its broad powers of discretion under the law to exclude individuals for other reasons. While there should not be an automatic exclusion of family members, since individuals can and do sometimes wish to acquire collective bargaining rights, it is equally true that there should not be automatic inclusion where individuals are shown to have an insufficient community of interest with those employees seeking to unionize.

11. Why has the Board not shaped the bargaining unit to actually reflect the interests of the employees in this case? The majority has failed to recognize precisely those labour relations dynamics that will work to defeat collective bargaining. At the very least, the Board in recognizing the different community of interest of employees, could have given these individuals a separate bargaining unit. It would have recognized the needs of the union while causing no prejudice to the employers. In my view, the Act specifically gives the Board broad discretion to recognize various interests in a workplace and to use that discretion to fashion bargaining units which recognize and reflect the different interests.

## BARGAINING UNIT DESCRIPTION

12. These are cases of first impression. The Board has sought to acquire some understanding of the fishing industry in order to shape the scope clauses to reflect the essence of these operations. In fact, except for the unloading of fish at various ports, the actual work of all the individuals takes place on Lake Erie. I adopt the tests applied by the majority, but having applied them, I would have found the Lake Erie unit, one of several appropriate units, to be the most appropriate in the circumstances.

13. First, the Board looked at the right of employees to self organization. In this case the union organized around and requested the Lake Erie bargaining unit description, and it demonstrated to the Board that the operations went beyond any one municipal boundary. Secondly, the

Board considered the requirement that the collective bargaining relationship be viable. Such a scope clause is clearly viable, it reflects the operations of the bargaining units with similar facts who agreed upon the Lake Erie bargaining unit description. There was no evidence that the Lake Erie scope clause would cause any prejudice to the employers; on the other hand it is certain to cause the union future interpretive and litigative problems given the current scope of operations. Finally, the Board looked at the nature of the industry. The industry is unique in terms of its operations and the Lake Erie unit reflects more closely the nature and operation of these companies.

14. It is our responsibility as a Board not only to reflect the considerations outlined above but also, where there is more than one appropriate unit, to seek to avoid foreseeable future difficulties. I dissent from the majority's decision on the scope clause in two cases for precisely this reason. Upon examination of the evidence, I have concluded that we are creating, not foreclosing, foreseeable future labour relations problems.

15. In the Batista file the Board has given the "in and out of Wheatley" scope clause but the criteria upon which it bases its decision for the same scope clause in the Simmons and Getty files appears not to have been applied to this file. The owner Mr. Batista lives in Leamington, not Wheatley and the shanty and storage area are located on the property in Leamington. They own no property or shanty in Wheatley, only renting space for storage of nets. The evidence was that the fixing of nets, making new nets and the drying of nets on reels all take place in Leamington. The company sells to Lake Erie foods and in the past to Omstead, but both companies pick up at the docks and there is no other work or operation of the Batista company at Wheatley other than this docking. Since the fishing takes place on Lake Erie and all other aspects of the operation of the business are in Leamington, it is difficult to understand why the majority defined the scope clause as "in and out of Wheatley" and I must disagree. In the Philcox and Elsley file, I would have exercised greater caution in deciding the scope clause. The company fishes out of Kingsville two weeks of the fishing season, out of Erieau three to four weeks and the rest out of Wheatley. It owns a shanty in Leamington where all the netting, repair, leading and corking of nets takes place. Again, most of the operation is neither centered in Wheatley or "in and out" of Wheatley, and the actual work of the individuals in the bargaining unit takes place on Lake Erie.

16. In determining scope clauses in an industry not previously given consideration by the Board, we must be particularly careful in crafting the bargaining unit description. The decision by the majority to avoid the "Lake Erie" bargaining unit description in these files has, in my opinion, opened the door to future labour relations problems which as a Board we could have foreclosed at the front end of the certification process. I will concur however, in the remaining cases in which the Board has given the "in and out of Wheatley" description, for example the Loop Fishery file, that the Board's additional comments about the intent of the scope clause as well as the inclusion of the clarity notes in the Board's decision will in some measure act to foreclose future difficulties between these parties.

#### JOHN TIESSON EXERCISES MANAGERIAL AUTHORITY

17. Quite apart from the issues addressed above, in the H. Tiesson Fisheries file I would have excluded John Tiesson from the bargaining unit on the basis that he exercises managerial authority within the meaning of the Act. The Board's tests in such cases is whether the individual, in exercising his or her duties can affect the economic lives of other employees in the bargaining unit. That is precisely the case with John Tiesson.

18. Counsel for the respondent asked the Board to liken the position of John Tiesson to that of working foreperson in the construction sector. The fact that John Tiesson works with a skilled crew in a specialized work operation and is a working captain makes this comparison some-

what appropriate. In such cases, the Board assesses the duties and responsibilities of the individual and on balance makes a finding about the inclusion in or exclusion from the bargaining unit. The evidence of John Tiesson was that he supervises five crew members, is responsible for the quality of their work, sometimes correcting and inspecting their labour. He decides where the crew will fish each day, the time of departure and return, and where the gear will be set down. He is responsible for filling out the daily catch sheet, logs the gear and keeps attendance records. Crew members ask him for time off and he grants it. His evidence was that he has recruited and hired replacement workers, and on one occasion hired a permanent employee subject to final approval by his father. With respect to the discharge of Mr. Santo, although his father Henry Tiesson actually terminated his employment, it was upon the recommendation of John Tiesson who told his father "I couldn't work with him". It was clear from the evidence that he even if he does not have absolute power to fire, he is in the position of being able to negatively affect the employment status of the crew members and has exercised this power. In my view, he has the power of effective recommendation.

19. The evidence also showed that John Tiesson plays a role in decision-making regarding expenditures. In a company that makes few capital investments after purchase of the boat and license, it is difficult to measure expenditure power. However, Tiesson's evidence was that the company's only recent major expenditure, \$4,500 for new radar, was recommended by him and purchased the previous year. John Tiesson is not involved in preparation of the budget but does, with his father, undertake the annual audit of the accountant's books. From this evidence as well as evidence of other discussions relating to the business, the Board can easily infer that John Tiesson has an active interest in the future direction and ongoing viability of the company.

20. On balance, the evidence establishes that John Tiesson does exercise managerial authority and should be excluded from the bargaining unit. Although each case must be decided on its merits, a good parallel can be found in the construction industry in *E. & E. Seegmiller*, [1987] OLRB Rep. Jan. 41. That decision involved the working foreman of a blasting crew. He sat in on job interviews and the Board found at least influenced hiring. He routinely checked the work of employees, could grant time off, could send workers back to the office and scheduled overtime. He had no spending power, no role in the budgets or records. The Board found that on balance he exercised managerial authority and excluded him. The evidence of John Tiesson is very similar. It is not absolute managerial authority, but nevertheless he can and has affected the economic lives of the crew members, in hiring, firing and the granting of time off. On balance, I would have excluded him for exercising managerial authority within the meaning of section 1(3)(b) of the Act.

21. Finally, with respect to the rest of the decisions in these files, I concur with the majority, particularly with regard to the careful consideration given to the question of on shore workers.

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**1949-86-OH Douglas Lloyd, Complainant, v. The Crown in Right of Ontario (Ministry of Community and Social Services), Respondent**

**Health and Safety - Complainant youth services officer at secured custody facility refusing to work at another location at the facility because of his belief that he would be putting his co-workers in danger - Complainant completing shift at his regular location and receiving reprimand letters - OHSA providing that such persons do not have the right to refuse work which would endanger their or co-workers' safety - Board dismissing complaint - Worker cannot refuse work on the basis that some other provision in the Act creates a right to disobey the employer - Complainant's actions constituting insubordination - Board not exercising discretion to substitute a different penalty**

**BEFORE:** *Ken Petryshen*, Vice-Chair, and Board Members *J. A. Ronson* and *D. A. Patterson*.

**APPEARANCES:** *Maureen Farson*, *Doug Lloyd* and *Laura Trachuk* for the complainant; *David Costen*, *Ed Maksimowski* and *Frank Szabadka* for the respondent.

**DECISION OF KEN PETRYSHEN AND BOARD MEMBER J. A. RONSON; January 26, 1988**

1. The name of the respondent is amended to read: "The Crown in Right of Ontario (Ministry of Community and Social Services)".
2. The complainant alleges that he has been dealt with by the respondent contrary to the provisions of section 24(1) of the *Occupational Health and Safety Act* (hereinafter referred to as "the Act" and "the OHSA").
3. The events giving rise to this complaint began on July 2, 1986. During the evening hours of that day, Mr. Doug Lloyd, who is employed as a youth services officer at the Brookside Youth Centre ("Brookside"), was directed during his shift by his supervisor and subsequently by the superintendent to report to work at another location at the facility. Mr. Lloyd refused to report for work at the other location. As a result of this refusal, he was ordered to leave the work place. Rather than leave, he elected to complete his shift. Lloyd's refusal to comply with the respondent's directions caused the respondent to issue two letters to Lloyd concerning the incident. The first letter, dated July 3, 1986, essentially advised Lloyd that future conduct of a similar nature would result in disciplinary action, not excluding dismissal. In the second letter, which was dated July 31, 1986, the respondent reprimanded Lloyd for his conduct of July 2, 1986. Lloyd claims that by directing him to leave the facility on July 2, 1986 without payment for those hours remaining in his shift and in issuing the letters of July 2 and July 31, 1986, the respondent has contravened section 24(1) of the Act.
4. Brookside is designated under the *Young Offenders Act* as a secured custody facility. The parties are agreed that Brookside is a facility within the meaning of section 23(1)(c) of the OHSA. The residents of Brookside are housed in cottage-type units. Carr House has 13 beds and each of the remaining units have 15 beds. The residents are between the ages of 13 and 18. Brookside accommodates residents who have been convicted of offences for which an adult would receive a sentence of over 5 years. In addition, persons a court has deemed to be a danger to society can be sent to Brookside. Brookside also operates an Observation and Detention (O & D) Centre which houses individuals who are awaiting trial or sentencing and, on occasion, persons who have created problems at other facilities.
5. Prior to May 23, 1986, the female residents who had been sentenced were placed in

Johnson House while Carr House was used as the O & D Centre. Subsequent to May 23, 1986, the female residents occupied the north end of Carr House and the south end of Carr House was utilized as the O & D Centre. This change was made to allow for a more efficient use of space and staff. From 7:00 a.m. until 11:00 p.m., a door located in the middle of Carr House was locked separating the female residents in north Carr from the O & D residents in south Carr. During these hours, north Carr and south Carr were treated as two separate units. The door was padlocked open at 11:00 p.m. transforming Carr House into one unit until 7:00 a.m. North Carr has seven beds and south Carr has 6 beds.

6. The front line staff, commonly referred to as youth services officers, normally work twelve hour shifts. The two primary shifts are from 7:00 a.m. to 7:00 p.m. and from 7:00 p.m. to 7:00 a.m. Some individuals work floating shifts from 9:00 a.m. to 9:00 p.m. and from 11:00 a.m. to 11:00 p.m. Between 7:00 a.m. and 11:00 p.m., when the door located in the middle of Carr House is locked, the north and south sides of Carr House would each have two youth services officers as of May 23, 1986. From May 23 to June 23, 1986, there were three youth services officers in Carr House between 11:00 p.m. and 7:00 a.m. Beginning on June 23, 1986, the respondent reduced the number of youth services officers on duty in Carr House to two between the hours of 11:00 p.m. and 7:00 a.m. As of June 23, 1986, one of the youth services officers in Carr House would complete his or her shift at 11:00 p.m. while another youth services officer would be sent to another house, leaving two youth services officers on duty in Carr House during the period of time when it operated as one unit.

7. There is little dispute between the parties with respect to the events which occurred during the evening of July 2, 1986. On that day, the complainant began working in north Carr on the 7:00 p.m. to 7:00 a.m. shift. At 11:00 p.m. he was scheduled to go to Martin House where he would work until the end of his shift. Lloyd's shift on July 2nd was his first shift after a two-week absence. It was during his absence that the respondent reduced the complement from 3 to 2 in Carr House during the period from 11:00 p.m. to 7:00 a.m. Between 9:30 and 10:00 p.m., G. Douglas, a shift supervisor, approached Lloyd and advised him that he would have to go to Martin House at 11:00 p.m. Lloyd testified, and we accept his evidence in this regard, that it was only when Douglas approached him that he became aware of the change concerning the reduction in staff. Lloyd told Douglas that he did not think it was a good idea to staff the house with only two employees after 11:00 p.m. Douglas indicated that if Lloyd did not do as he was told, he would have to call someone else in for Martin House. Lloyd responded by saying that that was okay since he would have to stay at Carr House.

8. A short time later, Douglas phoned Lloyd and asked him again if he was prepared to go to Martin House at 11:00 p.m. Lloyd's response remained the same. Douglas advised him that if he did not go to Martin House he would be sent home. Lloyd said he could not go home and leave only two employees in Carr House. Douglas advised Lloyd that Mr. Szabadka, the superintendent, would be coming in soon.

9. Shortly before 11:00 p.m., Szabadka and Douglas spoke to Lloyd at Carr House. Szabadka directed Lloyd to go to Martin House. Lloyd gave him the same response he had given earlier to Douglas. Douglas, who had a copy of the Act with him, directed Lloyd to section 23 and told Lloyd that he could not refuse to work. Lloyd said he was not refusing to work and explained that he was only refusing to work in a way that would jeopardize his peers in accordance with section 17 of the Act. Szabadka indicated to Lloyd that he was making a mistake and suggested to him that there were other ways to deal with the situation such as filing a grievance or by raising the matter with the Employee Relations Committee. Lloyd replied that such avenues required a long time and could not solve the situation he was faced with at that moment. Szabadka told Lloyd that he

would have to go home. Lloyd refused. When Szabadka advised Lloyd that he would not be paid if he remained, Lloyd indicated again that he would not go home and leave the other two employees in Carr House in jeopardy. On that note the discussion came to an end.

10. Lloyd has been employed at Brookside for approximately twenty years. During this time he has played an active role within his union, the Ontario Public Service Employees Union ("OPSEU"). He has been a member of the OPSEU executive board, chairman of the union negotiating committee, and at the time of the complaint, he was president of his local union. In his evidence, Lloyd explained why he felt it was necessary to remain at Carr House during his July 2 shift. We do not propose to set out all of his evidence on this point in detail. Suffice it to say that in his view the residents in O & D posed a greater risk to staff than other residents. In particular, he noted that at the relevant time one resident in O & D had been charged with murder, another with sexual assault, and a female in north Carr had been sentenced on a manslaughter charge. In Lloyd's view more staff was required in O & D than in the other houses because of the greater risk created by such a population. Lloyd was asked whether he realized he was placing another staff member in greater jeopardy by not going to Martin House. Lloyd explained that he did not believe this was the case since he understood from Douglas that another youth services officer would be called in to ensure that Martin House had double coverage. If the respondent had not indicated it was prepared to take this step, Lloyd testified that he would have had to make a difficult decision. He testified that he would have gone to Martin House if no one else had been called in but felt it was fortunate he did not have to make that decision. Lloyd completed his shift in Carr House. He did not leave Carr House until approximately 7:20 a.m. when he was replaced by the youth services officer who was scheduled to work the 7:00 a.m. shift.

11. Before leaving Carr House on the evening of July 2, 1986, Szabadka verified that the youth services officers were in their proper locations and that the residents were asleep. He also ascertained that the situation was relatively quiet that night. He had no indication from other staff members that there was a problem in Carr House. If a problem did develop, it would be handled in the normal course which could include calling in additional staff. Szabadka did not agree with the proposition that employees were subject to greater risks when working in the O & D Centre. In cross-examination, Szabadka testified that he was satisfied that Lloyd's conduct was motivated by a genuine health and safety concern for his fellow employees.

12. Counsel for the complainant called a considerable amount of evidence, including a person who counsel argued was an expert, to prove that in fact there was a greater risk to employees when they worked in the O & D Centre as opposed to some other part of the facility. Given the manner in which we have disposed of this case, it was unnecessary for us to reach a conclusion on this point.

13. On July 3, 1986, Lloyd received the following letter which he viewed as a letter of discipline for insubordination:

On the evening of July 2nd, 1986 you were scheduled to work from 1900 hrs. to 0700 hrs. on July 3rd, 1986.

At approximately 2100 hrs. you were working in the north part of Carr House. Mr. Garth Douglas, Shift Supervisor, advised you that at 2300 hrs. you would move to Martin House for the remainder of your shift, from 2300 hrs. to 0700 hrs. to act as the second staff in Martin House. At this point you refused to comply with the work assignment in Martin House.

On June 23, 1986, Janet Fisher, Unit Supervisor, stated in the Communication Logs of South Carr and North Carr that at 2300 hrs. the South Carr O & D Unit and the North Carr Custody



Unit would become one residential House by opening the connecting hall door and that henceforth Carr House would be staffed by two persons from 2300 hrs. to 0700 hrs.

Your decision on the evening of July 2nd, 1986, not to work in Martin House as of 2300 hrs. is insubordination. As a result of your refusal to comply with Mr. Douglas' order, you were advised by Mr. Douglas, after consultation with me, that you could either report to Martin House or go home, thus removing you from duty for the remainder of your shift. Since you continued to refuse to go to Martin House as instructed, you were relieved from your duties as of 2300 hrs. for insubordination and thus not subject to remuneration for the remainder of the scheduled shift. This was confirmed with you, by myself, at approximately 2330 hrs. in Carr House. You chose to remain in Carr House for the remainder of the shift, without assigned duties.

Mr. Lloyd, you are scheduled to work from 1900 hrs. on July 3rd, 1986 to 0700 hrs. on July 4th, 1986. Should you elect to repeat your actions of July 2nd, 1986, you shall again be relieved of your duties without pay and be subject to further disciplinary action, not excluding dismissal.

I regret that you have left me no option in this regard and I assure you that I am acting without prejudice in stating my position to you at this time.

14. After a pre-disciplinary meeting on July 28, 1986, Szabadka issued Lloyd a reprimand letter in the following terms:

On Monday, July 28th, 1986, you attended a pre-disciplinary meeting at Brookside School. The meeting was convened as a result of your refusal to comply with a work location assignment in Martin House on the evening of July 2nd, 1986.

Your categorical refusal to work in Martin House from 2300 hours to 0700 hours as ordered by the Shift Supervisor, necessitated that you be relieved of your duties for the remainder of your scheduled shift.

Your long history of competent performance as a Supervisor of Juveniles, combined with the fact that your Union representative admitted, on your behalf, that you had erred by your actions on July 2nd, 1986, had led me to conclude that this letter of reprimand is sufficient disciplinary action.

As a responsible staff member, I'm sure you can appreciate how inappropriate, disruptive, and unacceptable your actions were. Such behaviour cannot and will not be tolerated at Brookside. I would not expect from you, further incidents of this nature, but should they re-occur, I would have no option but to consider more severe disciplinary measures, not excluding dismissal.

15. The provisions of the Act relevant to this matter are as follows:

17.(1) A worker shall

- (d) report to his employer or supervisor any contravention of this Act or the regulations or the existence of any hazard of which he knows; and

(2) No worker shall,

- (b) use or operate any equipment, machine, device or thing or work in a manner that may endanger himself or any other worker; or

23.-(1) This section does not apply to,

- (a) a person employed in, or who is a member of a police force, to which *The Police Act* applies;
- (b) a full-time fire fighter as defined in *The Fire Departments Act*; or

- (c) a person employed in the operation of a correctional institution or facility, training school or centre, detention and observation home, or other similar institution, facility, school or home.

(2) Where circumstances are such that the life, health or safety of another person or the public may be in imminent jeopardy, this section does not apply to a person employed in the operation of any of the following institutions, facilities or services whether granted aid out of moneys appropriated by the Legislature or not and whether operated for private gain or not:

1. A hospital, sanatorium, nursing home, home for the aged, psychiatric institution, mental health or mental retardation centre or a rehabilitation facility.
2. A residential group home or other facility for persons with behavioural or emotional problems or a physical, mental or development handicap.
3. An ambulance service or a first aid clinic or station.
4. A laboratory operated by the Crown or a laboratory licensed under *The Public Health Act*.
5. Any laundry, food service, power plant or technical service or facility belonging to, or used in conjunction with, any institution, facility or service referred to in paragraphs 1 to 4.

(3) A worker may refuse to work or to do particular work where he has reason to believe that,

- (a) any equipment, machine, device or thing he is to use or operate is likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works or is to work is likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself or another worker.

(4) Upon refusing to work or do particular work, the worker shall promptly report the circumstances of his refusal to his employer or supervisor who shall forthwith investigate the report in the presence of the worker and, if there is such, in the presence of one of,

- (a) a committee member who represents workers, if any;
- (b) a health and safety representative, if any; or
- (c) a worker who because of his knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade union, is selected by the workers to represent them,

who shall be made available and who shall attend without delay.

(5) Until the investigation is completed, the worker shall remain in a safe place near his work station.

(6) Where, following the investigation or any steps taken to deal with the circumstances that caused the worker to refuse to work or do particular work, the worker has reasonable grounds to believe that,

- (a) the equipment, machine, device or thing that was the cause of his refusal to

work or do particular work continues to be likely to endanger himself or another worker;

- (b) the physical condition of the work place or the part thereof in which he works continues to be likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention continues to be likely to endanger himself or another worker,

the worker may refuse to work or do the particular work and the employer or the worker or a person on behalf of the employer or worker shall cause an inspector to be notified thereof.

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection 2, the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

16. Counsel for the Ministry argued that Lloyd was disciplined because of a refusal to comply with a reasonable direction and not because of any attempt on his part to enforce the Act or to act in compliance with the Act. He submitted that Lloyd's conduct amounts to insubordination and that Lloyd cannot rely on the legislative right to refuse unsafe work given the provision of section 23(1)(c) of the Act. In counsel's view, section 17 of the Act does not create an independent right to refuse work. This was not a case, counsel argued, which should cause the Board to exercise its discretion under section 24(7) of the Act since the penalty given to Lloyd was quite lenient.

17. Counsel for Lloyd argued that it was his compliance with the Act and his efforts to seek enforcement of the Act that prompted the management at Brookside to discipline him. Counsel argued that Lloyd was not refusing work within the meaning of section 23 of the Act and that his conduct should not be viewed as insubordinate. In her submission, subsections 17(1)(d) and 17(2)(b) create obligations for employees and that by acting in the way he did, Lloyd attempted to meet his obligations under section 17 of the Act. He made an honest attempt to address a health and safety concern and he should not be disciplined for his actions. Counsel submitted alternative positions with regard to what standard the Board should adopt when determining whether a "worker has acted in compliance with the Act or has sought the enforcement of the Act". Firstly, counsel argued that it is sufficient if the worker was acting in good faith with respect to a health and safety matter. Alternatively, counsel argued that it was enough if the worker reasonably believed he was acting in compliance with the Act. Counsel went on to submit that even if the worker is required to be right when assessing whether he or she is complying with the Act, on the



evidence before the Board Lloyd should succeed in this complaint. Finally, counsel urged us to exercise our discretion under section 24(7) to substitute another penalty.

18. Section 24(1) of the Act prohibits an employer or a person acting on behalf of an employer from responding in the ways detailed in (a) to (d) because a worker has acted in compliance with the Act or the regulations. When determining whether a worker has acted in compliance with the Act or with the regulations, it is not sufficient that a worker believes in good faith or reasonably believes he is complying with the Act or the regulations. The Board must be satisfied that a worker has, in fact, complied with the Act or the regulations and that such compliance prompted a prohibited response. Whether a worker has complied with the Act or the regulations depends on an interpretation of the relevant provisions relied upon and the facts in each case. It is not uncommon for complaints under section 24 to allege that an improper employer response occurred as a result of a worker's compliance with section 23 of the Act. In determining whether there has been a refusal within the meaning of section 23, it is necessary to determine the worker's belief at the first stage of the refusal and the reasonableness of the belief if the worker continues to refuse after an investigation has been conducted. It is not section 24 of the Act which makes such an inquiry necessary but rather the precise requirements contained within section 23 of the Act.

19. Section 24 also prohibits an employer or a person acting on behalf of an employer from responding in the ways detailed in "a" to "d" because the worker has sought the enforcement of the Act or the regulations. A worker may seek such enforcement by communicating with the employer, by contacting an inspector, by making a complaint under the Act, or by a number of other means. If the worker is seeking enforcement of the Act an employer cannot legally discipline, etc. the worker, even if the concern of the worker is not found ultimately to be a contravention of the Act. Conduct which seeks enforcement of the Act is protected activity in order to encourage workers to raise health and safety concerns with their employer and others and to thereby reduce the likelihood of injury in the workplace (see, *Commonwealth Construction Company*, [1987] OLRB Rep. July 961).

20. The Board is satisfied that the employer in this case did not act the way it did towards Lloyd because Lloyd sought the enforcement of the Act or because Lloyd complied with section 17(1)(d). It is arguable that when Lloyd advised certain management officials of the employer on July 2, 1986 that the staffing of Carr House was not adequate he sought the enforcement of the Act or attempted to meet his obligations under section 17(1)(d). We are satisfied that the employer's response in this instance was because of Lloyd's refusal to go to Martin House as directed and not because he attempted to enforce the Act or comply with section 17(1)(d). If Lloyd had simply conveyed his concerns to management and went to Martin House at 11:00 p.m. as ordered, he would not have been disciplined. The issue we are left with then is whether or not Lloyd's refusal to go to Martin House on July 2, 1986, is conduct which amounts to compliance with section 17(2)(b) of the Act.

21. In *Adelaide Building Services*, [1980] OLRB Rep. July 933, the Board decided that a refusal to work as provided under section 23 of the Act is not the only worker activity which is protected from employer reprisal under section 24 of the Act. The Board stated the following at paragraph 5:

That provision does not, on its face, limit its protection or application to situations where a worker has refused to perform work. The Act itself speaks to matters other than refusal, and, among other things, imposes a variety of obligations upon constructors, employers, supervisors, workers, owners and suppliers (see Para. III of the Act). A worker who is trying to comply with the provisions of this Act by getting his employer or supervisor to fulfil the obligations set out in sections 14, 15 and 16 of the Act, is not less entitled to the protection of section 24(1) than is the person who refuses to perform work. Therefore, the Board finds that the complaint on its face

does allege matters which may constitute a violation of section 24(1), insofar as they are capable of being included in sections 14, 15, 16 and 17, and that it has jurisdiction to hear the matter.

22. In *Baltimore Aircoil of Canada*, [1982] OLRB Rep. March 327, the Board interpreted section 17 of the Act and in so doing, analyzed the relationship between section 17 and section 23. The following comments of the Board are worth reiterating:

15. Although the protection afforded an employee under section 24 extends beyond a refusal to work, it is necessary to consider the extent to which the Act permits employee insubordination. Under section 23 of the Act an employee is expressly entitled to refuse to do whatever work he has been ordered to do where the preconditions set out in the section have been satisfied. Nowhere else in the Act can there be found an express entitlement to engage in insubordination. Under section 17(2)(b) a worker is under a statutory obligation not to work in a manner that may endanger himself or another worker. This section, considered in isolation, may be read as creating an implied entitlement to engage in insubordination to the extent that a worker, regardless of the instructions of his employer, is required to work in a manner that does not endanger himself. However, when section 17(2) is read in the context of the Act as a whole, we are unable to conclude that it creates an independent entitlement to refuse to obey the instructions of the employer beyond that contained in section 23 of the Act. The duty of an employee under section 17(2) is not new. It existed under section 27 of the *Industry Safety Act*, 1971 S.O. 1971 c. 43. It was never viewed as conferring a right to refuse to work. That right was enacted for the specific purpose and to be applied in the specific circumstances described in section 23 of *The Occupational Health and Safety Act*. Where an employee is subject to a written or verbal instruction and he has reason to believe that by complying with the instruction in the carrying out of his work he is likely to endanger himself, he is entitled to refuse to do the work in the manner directed.

16. The distinction between section 17(2) and section 23 is critical to the scheme of the Act. A refusal to work under section 23 triggers the carefully constructed mechanism established under that section for resolving situations which are perceived by an employee as posing a danger to his health and safety. If an employee simply disregards the instructions of his employer and takes it upon himself to establish his own procedure for doing the work, the initial problem may not be identified as posing a threat to his health and safety or that of any other employee subject to the same instruction. Furthermore, the resources which the Act contemplates be brought to bear (employer investigation and follow-up and, if necessary, the involvement of an inspector) may not be, to the potential detriment of workers. Where a worker is acting within the bounds of his own discretion, section 17(2)(b) obligates him not to work or operate equipment in a manner that may endanger himself or a fellow worker. However, where a worker is acting under a specific instruction, oral or written, and he has reason to believe that by complying with that instruction he may endanger himself or a fellow worker, he complies with section 17(2)(b), not by unilaterally substituting his own work method for that laid down by his employer, but rather, by availing himself of the right under section 23 to refuse to do work which may endanger himself or another worker. The administration of the Act in this way enhances worker safety by promoting immediate disclosure, discussion and inspection rather than resort to ad hoc solutions and the potential for hazardous situations to go undetected....

23. In her submissions, counsel for Lloyd attempted to persuade the Board that the approach adopted by the Board in *Baltimore Aircoil of Canada*, *supra*, has no application to the circumstances of this case. We disagree. In essence, the Board in *Baltimore Aircoil of Canada*, *supra*, concludes that the only right in the Act to refuse work is contained in section 23 of the Act. A worker cannot refuse work on the basis that some other provision of the Act creates a right to disobey the employer. Section 17(2)(b), in particular, does not entitle a worker to refuse an instruction. That provision places an obligation on a worker not to use or operate equipment, etc., and not to work in a manner that may endanger himself or any other worker insofar as a worker's conduct in these respects is entirely within his or her discretion. This interpretation of section 17 and the analysis of the relationship between section 23 and the other provisions of the Act, particularly section 17, contained in *Baltimore Aircoil of Canada*, *supra*, are very persuasive. Although the facts in *Baltimore Aircoil of Canada*, *supra*, are distinguishable since the worker in that case

could rely on section 23 of the Act whereas Lloyd is not able to do so, we are satisfied that the Board's interpretation of section 17 is a correct one.

24. Lloyd was instructed to go and perform his normal duties at Martin House at 11:00 p.m. on July 2, 1986. He refused to comply with this instruction on a number of occasions. He was directed to go home and he refused to do that as well. The basis for his refusal was a concern for the the health and safety of his fellow workers at Carr House. In our view, his refusal to comply with those instructions from his employer amounted to insubordination. Since the decision as to whether or not to go to Martin House was not a decision within his own discretion, it cannot be said that by refusing to go to Martin House he was meeting his obligations under section 17(2)(b) of the Act. Similarly, in this situation it could not be said that he was in breach of a duty under section 17(2)(b) if he had gone to Martin House as directed. Therefore, we are satisfied that Lloyd's refusal to go to Martin House on July 2, 1986 does not constitute compliance with section 17(2)(b) of the Act.

25. Section 23(1)(c) of the Act specifically provides that persons who work at institutions such as Brookside do not have the right to refuse work which might endanger their health and safety or that of their fellow workers. Subsection 1 also provides that such a right does not exist for the police or fire fighters. The reasons section 23 does not apply to these workers is obvious. Risking one's health and safety is one of the primary requirements of these occupations and if one were to allow individuals in these occupations to refuse work which involved a risk of injury, the important functions which they are obliged to perform would remain unfulfilled. To interpret sections 17 and 24 of the Act in the way Lloyd suggests is to effectively read subsection 23(1) out of the Act. It is inconceivable that the Legislature would explicitly exclude workers such as those employed at Brookside from the right to refuse work for reasons of health and safety in section 23 but then indirectly give them such a right under section 17 of the Act. The issue in this case essentially comes down to who is to determine staffing levels at Brookside. For workers at institutions such as Brookside, the message contained in section 23(1)(c) and the general scheme of the Act is that the resolution of staffing issues which raise health and safety concerns must be resolved in ways which do not involve refusals to work under the OHSA.

26. Although policy reasons dictate that the employees at Brookside can not refuse work for health and safety reasons within the meaning of section 23 of the OHSA, employees in Lloyd's position have been denied an important privilege. In a section 23(1) situation, a worker who is disciplined for refusing an employer's order which requires the worker to contravene the Act, does not have the protection of section 24(1) of the Act. However, this does not necessarily mean that no remedy is available. Subsection 24(7) provides that where a worker is discharged or otherwise disciplined for cause and no specific penalty exists, the Board may substitute a penalty which seems just and reasonable in the circumstances. This subsection gives the Board a very broad discretion. In reviewing all of the circumstances of a particular case, the Board undoubtedly would give some weight, depending on the penalty imposed, to the fact that a complainant was disciplined for refusing an order directing that person to act contrary to the Act or to the fact that a complainant was motivated by a health and safety concern and was acting in good faith. It was not suggested by either counsel that subsection 24(7) did not apply to the circumstances of this case. We note that the complainant is a person who is covered by the terms of a collective agreement (see, *Commonwealth Construction Company, supra*).

27. The Board is satisfied in the circumstances of this case that it would not be appropriate to exercise its discretion to substitute a different penalty. Although Lloyd was acting in good faith, insubordination is considered to be misconduct of the sort which warrants a significant disciplinary response. Lloyd refused to comply with directions from both his immediate supervisor and the



superintendent. He refused to go home when directed to do so and he was advised that if he did not go home he would not be paid for the remainder of his shift. Lloyd's refusal to go to Martin House caused the employer the inconvenience of having to call in an additional youth services officer. The employer's disciplinary response was not inappropriate. In essence, Lloyd received a reprimand and was not paid for the remainder of his July 2, 1986 shift. This mild response was clearly a result of a recognition on the part of the employer of Lloyd's seniority, his discipline free record and the fact that he was acting in good faith and for a health and safety reason when he refused to go to Martin House.

28. Accordingly, this complaint is dismissed.

#### DECISION OF BOARD MEMBER D. A. PATTERSON;

1. I dissent from the majority decision of the Board.

2. The crux of this case is whether the complainant's exclusion under section 23(1)(c) of the *Occupational Health and Safety Act*, which states,

23.(1) This section does not apply to,

...

- (c) a person employed in the operation of a correctional institution or facility, training school or centre, detention and observation home, or other similar institution, facility, school or home.

gives the respondent the right to compel the complainant to violate section 17(1)(d) and 17(2)(b) of the Act.

17.(1) A worker shall,

...

- (d) report to his employer or supervisor any contravention of this Act or the regulations or the existence of any hazard of which he knows; and

...

17.(2) No worker shall,

...

- (b) use or operate any equipment, machine, device or thing or work in a manner that may endanger himself or any other worker; or

...

3. The facts in this case are not in dispute between the parties so the Board is not faced with having to decide on the credibility of any witness over another. The issue in this case is the proper interpretation of section 17 of the *Occupational Health and Safety Act*, and the majority's failure to exercise its discretion under section 24 of the Act.

4. I believe the respondent's supervisor, Mr. Douglas and his superintendent, Mr. Szabadka, handled the incident incorrectly whereas the complainant, Mr. Lloyd remained consistent in dealing with the dilemma he faced the evening of July 2, 1986. Mr. Lloyd has been a front line corrections officer at Brookside for twenty years. He has been a responsible dedicated employee and

union activist which was openly acknowledged by the respondent. The respondent gave evidence that they believed Mr. Lloyd was genuinely and legitimately concerned over the health and safety of his fellow employees. Mr. Lloyd also gave evidence of his concerns. On the evening of July 2, 1986, Mr. Lloyd was torn between his responsibility to Brookside and his obligation under the *Occupational Health and Safety Act*. In Carr house that evening, housed in the O & D lockup, was one inmate charged with murder, one with sexual assault and one with manslaughter. There was no opportunity to resolve his concerns because the staffing changes were implemented in his absence and also Lloyd knew nothing of the changes until he was approached by Mr. Douglas, his supervisor, to leave Carr house to go to Martin House from 11:00 p.m. to 7:00 a.m. After their discussion, Mr. Douglas informed Lloyd he would have to call in another officer, which he did prior to 11:00 p.m., which was a satisfactory solution to Mr. Lloyd. The respondent asked Mr. Lloyd what he would have done if Douglas had not called in another officer that evening and Lloyd's response was direct, "it would have been a tough decision but I would have gone to Martin House".

5. This legislation imposes rights and obligations on both employers and employees. There are sections of the Act which are not applicable to certain employees, for example, those engaged in household work, farming, education, or those covered by other Acts, such as, the *Police Act* and the *Fire Department Act*. Mr. Lloyd is covered by the *Occupational Health and Safety Act*, he is only excluded from the provisions of section 23 of the Act. By excluding workers like Mr. Lloyd from section 23, the Legislature *did not* exclude these same workers from the remaining sections of the Act. There are penalties and fines which may be levied against employers *and* employees for breaches and violations of the Act. In my view, the intent of the legislation was to afford workers health and safety rights and procedures in which the workers' concerns could be raised and enforced without fears of reprisals or discipline for enforcing the Act. In the event an employee was disciplined or penalized in some way by the employer because the employee sought enforcement of the Act, the employee could appeal the discipline or penalty to the Ontario Labour Relations Board. The Board was granted discretionary powers under section 24(7) of the Act to amend or substitute any discipline or penalty:

24.(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

6. This case has to be determined under section 24 and section 17 of the Act. Consequently, the cases cited by the majority namely *Commonwealth Construction Company*, [1987] OLRB Rep. July 961 or *Adelaide Building Services*, [1980] OLRB Rep. July 933, or *Baltimore Aircoil of Canada*, [1982] OLRB Rep. Mar. 327, are distinguishable from the facts in this case, and are of no assistance here. In all three cited cases the Board points out the worker is under a statutory obligation not to work in a manner that may endanger himself or another worker. The difficulty in this case is that Mr. Lloyd is excluded from the provisions of section 23 whereas the workers referred to in the three above-cited cases all had protection under section 23 and to the remedies therein. However, Mr. Lloyd's situation is one in which he was not refusing to work in the sense contemplated by section 23 of the Act but rather he faced a dilemma as to where and how to work without violating section 17(2)(b) of the Act.

7. If an employee exercises any right under the Act in good faith, or exercises his obligations under section 17 of the Act, his actions were intended to be safeguarded against reprisals or penalty under section 24 of the Act. The Act cannot be circumvented by characterizing his actions

as insubordinate. I would have found the respondent in breach of section 24 of the Act, and exercised the Board's discretion under section 24(7) of the Act. We are not talking of a short-term employee here or an employee attempting to shirk his responsibilities. Mr. Lloyd remained on the job, continued to perform his functions as a corrections officer at Brookside in Carr house until 7:20 a.m. the following morning, in fact twenty minutes beyond his normal working hours. These do not appear to me to be the actions of an unreasonable insubordinate employee. Nowhere in the Act is the term insubordination mentioned. The majority decision is to grant the employer the unfettered right to compel an employee to knowingly violate the Act. The actions of the complainant were for no ulterior motive, but rather his legitimate concern for the health and safety of his fellow employees. This legislation surely could not have intended this result.

8. In conclusion, I do not believe it unreasonable to expect that workers such as Mr. Lloyd be afforded any less protection against reprisals than anyone else covered by the Act. I find the interpretation of the majority to be an unreasonable condemnation of the complainant's dilemma and subsequent resolve. This decision could be interpreted as condoning any disciplinary action taken by an employer against any employee excluded from section 23 who expresses a sincere health and safety concern. This Act's intent was to place health and safety in the forefront. I do not believe in 1988 we are prepared to subject correction officers, officers of the crown, courts or the public safety at more risk or to more penalty than the rest of society who all enjoy the protection, benefit and responsibilities under the Act.

**0280-87-U; 0281-87-U** United Brotherhood of Carpenters and Joiners of America, Local 1030, Applicant/Complainant v. **Nepean Roof Truss Limited**, Claude Ouellette, Hubert C. Steenbakkens, Respondents

**Practice and Procedure - Remedy - Unfair Labour Practice - Continuing unwillingness of employer to deal with the union as bargaining agent for the employees - President and Vice-President of employer personally liable for breaches of sections 64, 66, and 70 - Individual liability not depending on special circumstances - No remedy for some breaches because of delay**

**BEFORE:** *Robert Herman*, Vice-Chair, and Board Members *D. A. MacDonald* and *H. Kobryn*.

**APPEARANCES:** *Frank Manoni*, *Paul Simmons* and *Peter Simmons* for the applicant/complainant; *Russel W. Zinn*, *Hubert C. Steenbakkens* and *Claude Ouellette* for the respondents.

**DECISION OF THE BOARD;** January 13, 1988

1. The complainant alleges that the corporate respondent and two individual respondents have each violated sections 50, 64, 66, and 70 of the *Labour Relations Act*, and also asks that the Board give its consent to prosecute. Although there is a significant recent history of complaints or applications before the Board involving the corporate respondent, hereinafter "Nepean", this is the first proceeding which has named Ouellette and Steenbakkens personally as respondents. The instant complaint must be seen in historical context, and it is therefore necessary to sketch with some detail the entire chronology.

2. On October 9, 1984, Local 1030 filed an unfair labour practice complaint (Board File No.1864-84-U) naming Nepean as respondent. On November 5, 1984, Local 1030 was certified by



this Board to represent the employees of Nepean. On November 6, 1984, a second unfair labour practice complaint was filed (Board File No. 2146-84-U), and on November 28, 1984, a third unfair labour practice complaint was filed (Board File No. 2413-84-U), both the second and third complaints naming only Nepean as respondent. These three complaints were dealt with by the Board together in one proceeding, and they involved complaints about the behaviour of Nepean with respect to the termination of four grievors, and with respect to alleged violations of sections 15 and 79 of the Act.

3. In an oral decision delivered April 23, 1985 by a differently constituted panel, the Board found that Nepean had breached the Act in its discharge of the four grievors, directed that they be reinstated forthwith together with compensation, and remained seized with respect to the matter of compensation if the parties were unable to agree on the appropriate quantum. The oral decision noted that written reasons would follow. The panel reserved its decision on the question of the alleged breach of sections 15 and 79 of the Act.

4. Pursuant to the Board's direction the grievors were reinstated by Nepean the next day, April 24, 1985. At the request of Steenbakkers, the union and Nepean met on May 6, 1985 to discuss compensation. Nepean was represented by Ouellette, President and General Manager of Nepean and the individual responsible for day-to-day business decisions, and by Steenbakkers, who as Vice-President was involved in negotiations and other matters concerning Nepean's labour relations. He was not involved in day-to-day management of the company. Local 1030 was represented by its business agent, Frank Manoni. The three men discussed proposals for a collective agreement, and as part of that discussion considered the compensation due to the grievors. Whatever amount of compensation Manoni suggested as appropriate (the amounts varied as the compensation due each grievor was different), Steenbakkers and Ouellette indicated at first that the company would only pay half. They also indicated that their proposed terms for the collective agreement were conditional upon the grievors accepting the company's compensation offer.

5. Manoni refused to accept, on behalf of the grievors, what he considered to be inadequate compensation. With the union's permission, the reinstated employees were asked directly by Ouellette and Steenbakkers whether they would accept the offered amount of compensation, and the employees refused to do so. In discussing the compensation with Manoni, both Steenbakkers and Ouellette made statements indicating that they would close the shop or "have to go bankrupt" if they paid compensation beyond two weeks wages. Ouellette testified that he and Steenbakkers took this position because they felt that whatever amount of compensation was paid to the grievors, the same amount should be paid to all other employees of Nepean. As all other employees had been laid off at the same time, they testified, they felt it only fair that Nepean pay all employees the same amount. Ouellette acknowledged that Nepean was under no legal obligation to pay the other employees, but insisted that it was nevertheless only fair to do so. Both Ouellette and Steenbakkers took the position with Manoni that the large amount of money required to pay all the employees a similar amount of compensation would force Nepean to go bankrupt.

6. On May 27, 1985, three weeks later, Local 1030 filed two more unfair labour practice complaints (Board File Nos. 0480-85-U and 0481-85-U), alleging that Nepean, but not either Steenbakkers or Ouellette, had breached sections 15 and 79 of the Act, and asking for the Board's consent to prosecute Nepean.

7. On or about July 10, 1985, Manoni and Steenbakkers spoke by phone, concerning a possible adjournment of an appearance the following day in Toronto at the Board premises. Steenbakkers again offered Manoni two weeks compensation for the grievors, but Manoni refused. In

response, Steenbakkers indicated that the union could take him to the Supreme Court, but he would still not pay.

8. On August 20, 1985, Manoni, Steenbakkers and Ouellette met at the premises of Nepean, and again discussed both a proposed collective agreement and compensation for the grievors. Ouellette maintained that the compensation requested by the union was too great, stating that he might have to "close shop" because he would have to pay all employees the amount being requested. As part of a discussion on the overtime provisions proposed for the collective agreement, Manoni advised Ouellette and Steenbakkers that the overtime they wanted employees to perform was contrary to the law. In response, Ouellette indicated that he "didn't give a shit about the laws, he had a business to run". Although the union argued that this statement was tied to Nepean's obligation to pay compensation to the grievors, we are satisfied that Ouellette made the statement only with respect to the overtime provisions proposed for the collective agreement.

9. In November 1985, another panel of the Board heard the unfair labour practice complaint that had been filed against Nepean in May, 1985 (0480-85-U and 0481-85-U, see paragraph 6 above). That panel reserved its decision. As part of those hearings, evidence was led by both parties of the conversations that had occurred on May 6, July 10, and August 20, 1985, the very conversations which Local 1030 relies upon in the instant proceeding as constituting breaches of the Act by Ouellette and Steenbakkers. Again, neither Ouellette nor Steenbakkers had been named as respondents in those two earlier complaints.

10. A relatively calm period occurred between November, 1985 and July, 1986. On July 24, 1986, a panel of the Board, chaired by Judge Abella, directed that a first collective agreement be imposed, pursuant to section 40a of the Act ([1986] OLRB Rep. July 1005).

11. On July 31, 1986, two decisions were issued. First, with respect to the initial proceedings (Board File Nos. 1864-84-U, 2146-84-U, and 2413-84-U), a decision issued providing written reasons for the oral decision of April 23, 1985, and providing that panel's decision on the reserved matters, namely the complaints with respect to sections 15 and 79 of the Act, both of which were dismissed. Second, the Board, differently constituted, issued its decision on the more recent complaints (#0480-85-U and 0481-85-U), dismissing both the section 15 complaint and the application for the Board's consent to prosecute. The decision noted that the union had abandoned its complaint in respect of section 79. At this point, all decisions had issued and no matters remained reserved by the Board.

12. Shortly thereafter, on September 3, 1986, Local 1030 applied to the Board for determination of the appropriate compensation due the four grievors. It was this matter which Manoni had attempted to negotiate on May 6 and August 20, 1985. The July 10, 1985 conversation could more accurately be characterized as a restatement of the parties' positions, rather than a negotiating session.

13. On September 19, 1986, an application for termination of the union's bargaining rights filed by an employee of Nepean was dismissed by the Board: [1986] OLRB Rep. Sept. 1279. On September 24, 1986, and pursuant to the Board's direction of July 24, 1986 directing that a first collective agreement be settled by arbitration, another panel of the Board (at the parties' request) arbitrated the settlement of the parties' first collective agreement: [1986] OLRB Rep. Sept. 1287. On January 9, 1987, the Board, again differently constituted, issued its decision with respect to compensation due to the grievors, arising from the first three complaints (see paragraphs 3 and 11 above). No one appeared on behalf of the respondent Nepean at the compensation proceedings.

14. It was common ground among the parties that union dues were legally required to be

deducted and remitted to the union with respect to the employees of Nepean. Notwithstanding this legal requirement, and the fact that the company was aware in July 1986 that the union was seeking to obtain those dues, no dues were deducted or forwarded. Ouellette testified that he got a letter signed by all the employees, on July 29, 1986 (five days after the Board directed that a first collective agreement be settled by arbitration), which stated that the employees did "not wish to be represented by the union or pay union dues." Accordingly, Ouellette testified, as he felt that all the employees would quit if dues were deducted, he decided not to either deduct or remit dues. He also testified that the company could not afford to pay the dues. When no dues were forthcoming, the union filed a grievance and an arbitration board, on January 20, 1987, found that Nepean had breached the agreement by not deducting dues and directed that it pay the dues, and damages incurred in such collection, to the union forthwith. No one appeared on behalf of Nepean at the arbitration hearing. Steenbakkers testified that Ouellette had never advised him that the dues were not being deducted and remitted. He also testified, in response to being asked whether he was involved in the decision not to pay dues, that he had not really been so involved as Ouellette and the employees had made that decision together. Notwithstanding this testimony, we are satisfied that Steenbakkers was aware of and supported the decision that dues would not be paid. In all the circumstances, and given the long litany of proceedings and interaction between the parties and Steenbakkers' continuing involvement in those matters, the only reasonable inference is that Steenbakkers was both aware that Nepean was not deducting or remitting the dues and aware of the ostensible reason for this action, and that he concurred in the decision.

15. On February 6, 1987, the union requested that the Board register its compensation decision of January 9, 1987 with the Supreme Court of Ontario, for enforcement purposes. The pivotal event which led to the instant proceedings also occurred on February 6: Nepean's premises burned to the ground. At the time of the fire, both Ouellette and Steenbakkers were out of the country, attending a convention in Florida. They did not return to Ontario until several days after Nepean's plant burned down.

16. On March 3, 1987, as per the request of the union, the Board compensation direction was registered with the Supreme Court. The union took other steps to try to collect the compensation ordered by the Board, but it was unable to realize any funds from the fire insurance or other assets of Nepean.

17. The instant complaint and application were filed on April 27, 1987, and as indicated above, these were the first proceedings in which Steenbakkers and Ouellette were personally named as respondents and in which Local 1030 sought any directions against them personally. The circumstances relied upon by Local 1030 as constituting breaches consist of, first, the conversations that occurred on May 6, July 10, and August 20, 1985, involving the attempts of the parties to work out the amount of compensation due the four grievors by Nepean, and second, the complete repudiation by the respondents of the collective agreement imposed on September 24, 1986, evidenced by their continuing refusal to deduct and remit dues.

18. Manoni explained the delay in bringing the instant complaint in various ways. In essence, the union's submission is that it could not have done anything until the written reasons issued for the direction to reinstate and compensate the four grievors and on the other reserved matters, which was not until July 31, 1986 (see paragraph 3, above). The union would not have been able to get the Board to quantify the compensation before then, because the Board had not yet decided all aspects of the complaint. Within a relatively short time after getting the relevant decision, the union had asked the Board to determine compensation. Manoni also submitted that he had tried, actively and on numerous occasions, to get Nepean to pay the compensation, but each time was met by the response that only two weeks compensation would be paid, or the com-



pany would go bankrupt. Finally, and with admirable candour, Manoni testified that the instant complaint would certainly not have been filed had Nepean paid the compensation or paid the dues owing under the collective agreement. It was only the union's inability to collect the sums from the corporate employer, Nepean, and the fact that since the fire such recovery would forever be impossible, that had prompted the filing of this complaint.

19. The Board must decide several issues. First, did the conversations and events that occurred between May and August of 1985 constitute breaches of the pleaded sections of the Act. Second, if such events did constitute breaches, did either or both of the individually named respondents also breach the Act with respect to those same events. Third, if the Board does find that Nepean and either or both of Ouellette and Steenbakkens did breach the Act with respect to those 1985 events, ought the Board to issue any remedy in light of the history of these proceedings and the significant delay on the part of the union in filing this complaint. Fourth, and a matter quite distinct from the events of the summer of 1985, did any of the respondents breach the Act by their repudiation of the collective agreement and more particularly by their failure to deduct and remit dues. No issue of delay arises with respect to these latter events.

20. With respect to the actions of the respondents in dealing with compensation, counsel for the respondents submits that all three respondents were merely trying to negotiate the best deal possible with respect to compensation, and the Board ought not to intrude into this negotiating process. Parties regularly say things and make statements designed to exert pressure on the other side to agree to their position. Counsel submits that nothing more than this occurred in the instant case.

21. The Board readily recognizes the free-wheeling nature of negotiations, whether they revolve around compensation for individuals or the terms of a collective agreement, and the Board will not lightly intrude into this sphere, for to do so would hamper the negotiation process. At the same time, it cannot as a matter of law be a complete answer to an unfair labour practice allegation that the events occurred during negotiating sessions. Both the statutory language and sound labour relations policy require that in such circumstances the Board pierce the negotiating veil to consider whether a breach has occurred. The task is to decide whether what occurred was part of the negotiating process deserving of protection, or the commission of an unfair labour practice even though it occurred during such negotiations.

22. Sections 64, 66, and 70 read as follows:

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or

- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

23. Having regard to the evidence, we are satisfied that Nepean has breached the Act. Nepean has demonstrated a constant and continuing unwillingness to recognize or deal with the union as bargaining agent for employees in the bargaining unit. In the fall of 1984, before bargaining rights were acquired, Ouellette told several employees that he would close the business if a union was ever certified. In an earlier proceeding, the Board found that Nepean had breached the Act in its discharge of four grievors, discharging them for union activity (see paragraph 3, *supra*). Then, in May, 1985, when Manoni approached Ouellette and Steenbakkens to negotiate compensation for the grievors, Nepean refused the requested amounts for reasons that can only be construed as attempts to penalize employees and the union for exercising their rights under the Act. The grounds given for refusing to pay the compensation did not include any suggestion that the quantum requested did not accurately reflect the amount due to the grievors. Rather, Nepean predicated its refusal solely upon the grounds that fairness demanded that whatever amounts Nepean paid to the grievors, it also had to pay the same amounts to other employees in the bargaining unit. There was no legal requirement that those other employees be paid compensation, nor was Nepean under any illusion that such an obligation existed. Nor was any evidence led before the Board suggesting that those other employees were in the same situation as the four grievors. Nepean was telling the union and the grievors that, although their rights under the Act had been breached by Nepean and Nepean had forced them to go through lengthy and expensive Board proceedings to enforce those rights, Nepean would gratuitously give the same compensation to all employees, though the rights of no other employees had been found to have been breached and though no other employees were owed any money.

24. The approach taken by Nepean was designed to undercut the bargaining authority of the trade union, and indicate in graphic terms to all employees that Local 1030 could get nothing for employees unless the employer consented, and anything that Local 1030 could obtain for employees, the employer would in any event give to all employees. Nepean's behaviour in this respect was specifically designed to discriminate against the grievors because of their union membership and because they chose to exercise their rights under the Act. Its behaviour was also designed to interfere with the representation of employees by the trade union. The conduct also constituted intimidation or coercion within the meaning of section 70, in that this approach was designed to exert pressure on employees to abandon support for or to refuse to give support to the trade union or alternatively, to refrain from exercising its rights under the Act. We accordingly find that Nepean breached sections 64, 66, and 70 of the Act, as evidenced by the discussions that occurred between the union and Ouellette and Steenbakkens between May and August of 1985.

25. Having found that Nepean breached the Act, we must next ask whether Ouellette and Steenbakkens did as well. Counsel for the respondents argued that personal liability could not in these circumstances, as a matter of law, be found pursuant to sections 64 and 66 of the Act. Counsel submitted that where those sections refer to "no person acting on behalf of an employer", they do not constitute authority for the Board to find an individual officer or owner of a corporate employer to be personally liable. Rather, counsel submitted that those sections, and this particular phrase therein, enable the Board to find liability with respect to third parties who act on behalf of

an employer. Such potential liability is necessary in order to preclude employers from doing indirectly, through the actions of a third party, what they cannot do directly. Counsel further submitted that the statute is clear where personal liability is meant to be found under a particular section, and looking to those other sections buttresses the submission that personal liability of an owner or officer of an employer was not contemplated by the wording of sections 64 and 66. Counsel referred to section 70, which indicates that "no person ... shall" as an example of a clear indication that individuals can be personally liable for a breach of that section. Counsel also referred to section 98 of the Act, dealing with prosecutions for violations of the Act, as illustrating that the statute is clear where a court (or tribunal) is able to find personal liability. Finally, counsel submitted that it would be unfair to attach personal liability pursuant to sections 64 and 66, for to do so would mean that personal liability would be found in every breach of the sections by a corporate employer. As corporations can only act through the conduct of individuals, finding liability on behalf of the corporate employer would necessarily, in counsel's submission, lead the Board to find liability against the individual officer who engaged in the offensive conduct. Were the Board to find such authority in the wording of section 64 and 66, there would be two findings of a breach of the Act with respect to the same set of circumstances. In addition to routinely and inappropriately piercing the corporate veil, counsel submitted that such double liability would be unfair.

26. As counsel recognized in his submissions, prior decisions of the Board have either found or recognized that personal liability can be found under these sections: for example, *Sunnylea Foods Limited* [1981] OLRB Rep. Nov. 1640, *Heritage Manor Rest Home* [1983] OLRB Rep. March 385, *Daynes Health Care Limited* [1985] OLRB Rep. March 387, *Termarg Food Services Limited* [1985] OLRB Rep. March 516, *Doyles Tavern* [1985] OLRB Rep. May 662, *Forintek Canada Inc.* [1986] OLRB Rep. April 453 and *Peralta Foods* [1987] OLRB Rep. Sept. 1162. We agree with those decisions where they find statutory authority in sections 64 and 66 for the jurisdiction to find personal liability. The clear wording of those sections, particularly where they state "no employer ... or person acting on behalf of an employer ..." gives the Board jurisdiction to find that an individual has breached the section, including an individual other than one working for a party unrelated to the corporate employer. We see nothing in that phrase which suggests that a person "acting on behalf of an employer" cannot be an owner or officer of the corporate employer. We are not prepared to read into that phrase a limitation on finding liability that depends on the identity of the employer of the "person acting on behalf of", as suggested by counsel for the respondents. To read such a restriction into that section is neither consistent with the language used therein, nor consistent with sound labour relations policy. These sections are designed to protect the ability of unions and individuals to exercise the rights afforded them under the *Labour Relations Act*. To read in the limitation suggested by counsel for the respondents would be to allow individual officers or owners of a corporate respondent to escape personal liability for any wrongdoing committed by them. In circumstances where, for example, the corporate entity is a shell corporation or a corporation without significant assets, individuals could in practice breach these sections with impunity. Given the clear language, it remains open to the Board to find that an individual has breached the Act, where it is so pleaded and is borne out by the facts (having regard to the section claimed to have been breached).

27. As the then chairman of the Board stated in *Sunnylea Foods Limited*, *supra*, at ¶38:

...I can conceive of a number of situations where it would be appropriate to name the person responsible for the unfair labour practice where that person is primarily in control of the employing entity or other organization... No matter how mild the remedy, it is one that the complainant should be able to pursue against the ongoing activities of Mr. Zonneveld. Indeed, had the complainant's core allegations been established, a remedy confined to *Sunnylea* may have been quite ineffective. If the potential for personal liability is not understood in the labour relations community, I would hope this decision sheds some light on the matter."



28. And in *Termarg Food Services Limited*, *supra*, at ¶6, the Board noted:

“... in an appropriate kind of case, and at least where the corporate entity itself has disappeared or has explicitly threatened to do so if a full measure of damages is claimed, the Board is not unprepared to fix liability to an individual or “person” acting on behalf of the corporate employer. But again, every corporation must ultimately act through individuals, and the applicant has been unable to plead (nor, as in *Sunnylea* and *Daynes*, has prior litigation shown) a course of conduct anywhere close to the exceptional circumstances causing the Board to consider the steps it did in those latter two cases.”

It may not be necessary in a given case for the Board to decide whether an individual has breached the Act. But where the Board does find it necessary to determine that issue, whether or not the Board will find individuals to have breached the Act does not depend on special or exceptional circumstances. It depends only on whether the persons are alleged to have breached a particular section of the Act, and on whether the evidence establishes their breach of that section. The Board of course retains a discretion, notwithstanding the breach, over the appropriate remedy, if any, to be directed against an individual, or against a corporate employer for that matter, and the exercise of this discretion depends on whether the Board considers it appropriate in the circumstances, in the interests of promoting harmonious labour relations within the Province.

29. Ouellette and Steenbakkens, as President/General Manager and Vice-President, respectively, were the individuals who directed, managed, and controlled the company’s operations, and together they directed those operations with respect to all labour relations matters. Both of them were present and made statements indicating their intention to continue to try to undermine the rights of the union and employees under the Act. In these circumstances, we conclude that both Ouellette and Steenbakkens breached sections 64, 66 and 70 of the Act by their conduct.

30. The more difficult question is whether to provide any remedy for these breaches, in light of the history of these proceedings, and more particularly, the fact that the breach first occurred around May, 1985, yet this complaint was not filed until April, 1987, almost two years later.

31. The mere fact that the union brings this complaint to attempt to enforce collection of compensation no longer obtainable from the corporate respondent Nepean would not lead us to decline to provide a remedy against the individual respondents. Had this complaint been brought in a timely fashion, shortly after the events complained of had occurred, we would have issued the appropriate remedial orders against Ouellette and Steenbakkens. However, in the circumstances, we exercise our discretion pursuant to section 89 of the Act to decline to issue any remedy against any of the respondents, including Ouellette and Steenbakkens, with respect to the breaches that occurred around May 6, 1985.

32. The Board regularly declines to provide relief, and usually declines to even inquire into the matter, where complaints are not brought in an expeditious fashion, and with no justifiable excuse for the delay: see, for example, *Catherine Whittaker* [1985] OLRB Rep. Apr. 621 *Savage Shoes Limited* [1983] OLRB Rep. Dec. 2067, *Corporation of the City of Mississauga*, [1982] OLRB Rep. March. 420, *Sheller-Globe of Canada Ltd.*, [1982] OLRB Rep. Jan. 113. We do not propose to recite long passages from those cases, or numerous other Board decisions on point, but refer the parties to those decisions for an explanation of the factors the Board considers in exercising its discretion in this regard and the reasons for the Board’s concern with respect to delay. In the instant proceeding, there was nothing preventing Local 1030, when it filed its initial complaint in October, 1984, from also naming Ouellette and Steenbakkens individually as respondents. While we appreciate that the events complained of in the instant proceeding had not occurred at that point, Nepean was already committing its first unfair labour practices, and was doing so through the actions of Ouellette and Steenbakkens. Quite apart from the ability of the union to have named those individ-

uals in 1984, there was nothing precluding the union from filing the instant complaint shortly after the events in the summer of 1985. The union had a justifiable reason for its delay in asking the Board to determine the compensation with respect to the oral decision of April 23, 1985. Until written reasons for that decision issued, and in any event until that panel issued its decision on July 31, 1986 with respect to all the unfair labour practices alleged it would be unrealistic to expect the union to call upon the Board to determine the appropriate compensation. Until the Board and the parties knew the full extent of the breaches of the Act, it would be extremely difficult, if not impossible, to determine compensation.

33. However, those proceedings arose out of separate events, events that occurred *before* April 23, 1985. The events that occurred *after* April 23, 1985, which formed the subject matter of the instant complaint, were in no way affected by the decision and matters that the first panel considered. Perhaps it was best put by Manoni himself, when in his evidence he indicated that the instant complaint would not have been filed at all, with respect to the events in the summer of 1985 at least, had the union been able to recover the damages from Nepean. It was only when Nepean's premises burnt to the ground that the union was led to file this complaint. Indeed, as noted above, the circumstances giving rise to the breach were fully canvassed in litigation initiated by the union, with respect to an allegation of a breach of section 15, in hearings that occurred in November of 1985. At that point it was clear that the union was not concerned enough about the breaches of the Act committed by Steenbakkens and Ouellette in the summer of 1985 to take any concrete action to deal with those breaches. The union was not concerned enough about those breaches to take any action during all of 1986. It only became concerned about that behaviour when Nepean no longer existed other than on paper. Throughout this lengthy period, neither Steenbakkens nor Ouellette would have been put on notice that the union would be alleging that they personally had committed an unfair labour practice, nor that the union would be seeking damages from them in their personal capacities. To the contrary, given the numerous proceedings and the fact that neither was named as a respondent in any of them, both individuals would have concluded that no personal liability was being sought. In all these circumstances, we do not consider it appropriate to issue any remedy with respect to the first set of breaches.

34. The alleged breach evidenced by the failure of Nepean to deduct and remit the dues owing under the collective agreement is another matter. There has not been a significant delay between the conduct complained of and the filing of this complaint. We are satisfied that Nepean breached the Act in its refusal to deduct and remit union dues as required under the terms of the collective agreement. Nepean sought to undermine the bargaining and representational authority of the union by its stance of refusing to deduct and remit dues because the employees did not want to pay them. Counsel for the respondents argued that "abiding by employee wishes is not a violation of the Labour Relations Act". To the contrary, in the circumstances before us once the union obtained the right under the Act to act as agent for and to represent and bargain on behalf of employees in the bargaining unit, the employer was in violation of section 64 of the *Labour Relations Act* when it sought to deal with its employees as if they were not represented by a duly certified trade union with a legally binding collective agreement. Counsel for the respondents also submitted that in order to find a breach of section 64, the Board must be satisfied that the respondents failed to deduct and remit the dues because of "anti-union" animus. We are satisfied that Nepean's conduct was intended to, and did in fact, interfere with the representation of employees by the union. Such conduct was therefore in contravention of section 64 of the Act, regardless of whether the behaviour was motivated by a general "anti-union" animus.

35. We are also satisfied that Nepean violated sections 66 and 70 of the Act. Its behaviour in refusing to deduct and remit dues can only be construed as being intended to apply additional pressure on employees to turn against the union. It reflected the ongoing and continuous objection

to dealing with the union as bargaining agent for the employees, and illustrated the employer's continuing view that it could and should represent what it perceived was the interests of the employees as against their legal bargaining agent.

36. The respondent Ouellette also breached sections 64, 66, and 70 of the Act in his conduct in refusing to deduct and remit dues. The evidence established that Ouellette made the decision, for the reasons already outlined, not to deduct any of the dues. His was the directing and controlling mind that made the decision and he therefore breached the Act in the circumstances.

37. With respect to Steenbakkers, we conclude that he knew Nepean was not deducting and remitting dues as required and that he approved of that approach for the same reasons as did Ouellette. Steenbakkers and Ouellette met together with Manoni in dealing with labour relations matters, and all the decisions appeared to have been taken by both of them or at least approved by each of them. When Ouellette received the written statement from employees indicating that they did not want to be represented by the union or pay union dues, he went on a local television program and advised viewers that despite the Board decision, his employees did not want to pay union dues. In these circumstances, particularly given the long history of impermissible conduct by Nepean and the fact that Ouellette and Steenbakkers were the controlling and directing minds behind that conduct, we are satisfied that Steenbakkers was involved in the decision not to deduct and remit dues and he took this decision for the same reasons as did Ouellette, a continuing refusal to recognize and deal with the union and an attempt to undercut its authority. We therefore conclude that Steenbakkers also breached sections 64, 66, and 70 of the Act.

38. No submissions were made with respect to the alleged breach of section 50 of the Act, and the application is accordingly dismissed with respect to the complaint pursuant to that section. The Board declines to give its consent to prosecute, given the passage of time and the availability of other remedies.

39. Remedial relief will only issue with respect to the breaches of sections 64, 66, and 70 found in paragraphs 34 and following. A hearing into the appropriate remedial relief is hereby set for April 14, 1988, in Ottawa, before the instant panel. If before that time the parties are able to agree upon the appropriate remedial relief, they are to advise the Board and the hearing will be cancelled. Failing such notification, the hearing will proceed on that date as scheduled.

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**0026-85-R** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 800, Applicant v. **Northern and Central Gas Corporation Limited**, Respondent v. Group of Employees, Objectors

Certification - Employee - Reconsideration - Prior Board decision finding that persons engaged as construction inspectors not exercising managerial functions - Reconsideration request of respondent premised, *inter alia*, on the ground that the delay between the close of hearing and the issuance of the Board's decision raised a reasonable expectation that its submissions on managerial status would meet with success - Reconsideration dismissed

**BEFORE:** *Thomas S. Kuttner*, Vice-Chair, and Board Members *W. H. Wightman* and *S. O'Flynn*.



## DECISION OF THE BOARD; January 18, 1988

1. By letter dated September 18, 1987, the respondent has requested a reconsideration of the decision of the Board herein dated June 30, 1987. There, the Board, as presently constituted, panel member Wightman dissenting, determined that persons engaged by the respondent as construction inspectors operating out of its offices in North Bay, Ontario and for whom the applicant was seeking bargaining rights, did not exercise managerial functions and hence were not excluded from the status of employee for the purposes of the Act by the provisions of section 1(3)(b) thereof as had been contended both by the respondent and the intervening group of employees. A certificate issued accordingly. The spokesman for the intervening group of employees supports the respondent in its request for reconsideration; the applicant opposes it. No party seeks a hearing prior to determination by the Board of this request.

2. The request for consideration was premised upon two bases, the one relating to the Board's process in this case, and the other to the substance of its actual decision. In terms of process, the applicant asserts that the 14 month delay from the close of hearings in this matter on May 1, 1986 to the issuance of the Board's decision on June 30, 1987, raised a reasonable expectation that its submissions asserting managerial status on the part of the persons for whom bargaining rights were sought would meet with success and gain the assent of the Board. In the result, this was not the case. As to the substance of the Board's decision, the respondent asserted that the finding of employee status "ignored very compelling evidence which demonstrated that the construction inspectors *did* exercise managerial functions within the meaning of the *Labour Relations Act* and Board policy as applied by the Board in other decisions on this issue." In our consideration of this request we deal firstly with this latter ground for reconsideration.

3. The jurisdiction of the Board to reconsider its own decisions is conferred expressly by the provisions of section 106(1) of the Act which stipulate:

106.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

Although the jurisdiction of the Board to reconsider is a plenary one vesting the Board with a fulsome degree of flexibility to respond to exigencies of fact and circumstance which may militate against the continued governance of determinations earlier made, its exercise must be fitted to meet other competing values which inform the process of decision-making by any adjudicative tribunal. Principal among these are those of certainty and finality in decision-making and the resultant reliance on Board decisions which those values engender in persons subject to the Board's process.

4. Thus, the Board early developed a jurisprudence, consistently applied from its first articulation to the present, which channels and directs its jurisdiction to reconsider decisions previously rendered to a circumscribed category of cases. In *O.J. Pipelines Ltd.*, [1984] OLRB Rep. Dec. 1737, Vice-Chair Satterfield reviewed much of that jurisprudence at paras. 13 and following as follows:

13. . . .

The principles which guide the Board in the exercise of its reconsideration powers are described

in the following terms in its decision in *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Feb. 185:

4. To avoid abuse of the reconsideration provision and bring some finality to its adjudicated decisions the Board has adopted principles not unlike those of the courts. The Board will not normally accede to a request to reconsider unless the party requesting reconsideration intends to adduce new evidence which was not previously available to them by the exercise of due diligence, and then only where such additional evidence, if proved, would be likely to make a substantial difference to the outcome of the case. Reconsideration is therefore generally restricted to allowing a party to adduce evidence or make representations which it did not have a previous opportunity to raise. The Board may also consider such factors as the motives for the request for reconsideration in light of a party's conduct, and the resulting prejudice to another party if the case is reopened. (see, generally, *International Nickel Company of Canada*, 63 CLLC ¶16,284; *The Detroit River Construction Limited*, 63 CLLC ¶16,260; *National Steel Car Corporation Limited*, [1966] OLRB Rep. Apr. 55; *Canadian Union of General Employees*, [1975] OLRB Rep. Apr. 320; *York University*, [1976] OLRB Rep. Apr. 187 affirmed, sub. nom. *Jordan v. Ontario Labour Relations Board, York University Avenue Faculty Association, York University*, 78 CLLC ¶14,132. (Ont. Div. Ct.).

14. The *Detroit River* decision referred to in the quotation from *K-Mart*, *supra*, sets out the rationale behind the Board's perception that there is, as it said in *K-Mart*, *supra*, a need to "...bring some finality to its adjudicated decisions....":

"...While depending upon the circumstances of the case and the applicable principles of natural justice, the Board ought not to be as strict or as technical as a Court, it must nevertheless, in our view, recognize the necessity for and apply some principle of finality to its decision. It stands to reason that when a party has gone through the ordeal, expense and inconvenience of a hearing and obtained a decision in his favour, that he should not be deprived of the benefit of that decision except for good cause....If it were otherwise, the door would be open in any given case to ceaseless and never-ending hearings each serving as a prelude to the next *ad infinitum* and no one could ever safely rely on any decision as finally settling the rights of the parties."

The Board's decision in *Journal Publishing Company of Ottawa Ltd.*, [1977] OLRB Rep. Sept. 549, at paragraph 6 cited two main reasons for the requirement of finality:

"...The first reason is to protect the interests of those who have relied upon the Board's decision. The reliance interest is perhaps most important in those cases where the Board's decision has the effect of conferring or withdrawing bargaining rights. In such cases, where representation rights are in issue, the need for certainty and finality becomes obvious. A second reason *sic*, and perhaps no less important, is to protect the integrity of the Board's own processes. These processes must be protected from the parties who, under the guise of reconsideration, are merely seeking to repair, or reargue, a lost case.

15. The passage quoted from the Board's *K-Mart* decision, *supra*, notes that, while reconsideration is usually restricted to allowing a party to adduce evidence or make representations which it did not have a chance to raise previously, "... the Board may also consider such factors as the motives for the request for reconsideration in light of a party's conduct, and the resulting prejudice to another party if the case is reopened." Thus the usual grounds for reconsideration are not the only ground and in its decision in *John Entwhistle Construction Ltd.*, [1979] OLRB Rep. Nov. 1096, the Board observed that it is important not to follow the usual grounds inflexibly:

"...These are general standards which the Board has developed as guidelines and which are useful not just to guide the Board in making its decision, but also to allow parties who may be affected by the Board's decisions some degree of certainty that these standards generally be adhered to, it is equally important that they not be followed inflexibly."

• • •

5. In the case before us no attempt is sought to adduce new evidence. Rather, the respondent reviews in a very generalized manner the extensive evidence upon which the Board based its decision, namely, the Labour Relations Officer's report containing the transcript of evidence of the three individuals whose testimony was agreed by the parties to be representative of the duties and responsibilities of the entire class of persons for whom bargaining rights were sought, and as well the evidence as to those duties and responsibilities given by a senior member of management. The applicant asserts that the characterization by the Board of that evidence as indicating an exercise of duties and responsibilities indicative of employee status is a mistaken one and that the opposite conclusion should have been made - that these indicate an exercise of managerial functions. No argument is put to the Board that was not or could not have been put to it at the time of the hearing in this matter. No case is pleaded that would support the assertion that the Board ignored its own policy as applied in other decisions on the question of managerial status, nor in light of the extensive review taken of the earlier jurisprudence could this be.

6. The particularized concern of the respondent with the finding of the Board in paragraph 24 misses the essential point made that any single function that might, viewed in a vacuum, point to managerial status, must be assessed within the setting of the totality of duties and responsibilities exercised within the enterprise under review before a finding of the exercise of managerial functions as contemplated by the statute might be made. Here, the determination of the majority of the Board was that the disputed functions viewed in that perspective against the totality of the evidence and in the context of this particular enterprise simply do not support a finding of the exercise of managerial functions.

7. Thus, we find the submissions of the respondent (echoed as well by those of the intervening group of employees) which are based upon disagreement with the findings of the Board and perceived deficiencies in its decisions not to be a sufficient basis upon which to successfully ground a request for reconsideration. We turn now to the alternative grounds upon which this request was made, that of Board process.

8. In *Canadian Union of General Employees*, [1975] OLRB Rep. April 320, the Board viewed the principle of finality in its decisions as undergirding two further values which should inform the workings of an administrative tribunal - such as the Board, those of dispatch and economy in the processing of matters with which it is seized (p.325). That there was a failure to further and fulfill those values in the instant case cannot be denied. Accepting that the delay of 14 months from close of proceedings to issuance of decision was an inordinate one, the question remains what, if any, effect should dilatory conduct on the part of the Board have upon exercise of the power to reconsider its decision. The respondent would have it that as celerity of process is axiomatic where the conferral of bargaining rights is at issue, its absence gives rise to a reasonable expectation on the part of those opposed that such rights will not be conferred by Board determination. Even if one were to accept the logic that delay in the grant of a certificate portends denial of entitlement to its issuance, the Board fails to comprehend why such delay should ground an application for reconsideration where such expectations were not realized in the decision ultimately handed down. Perhaps if there could be shown prejudice to the party adverse in interest occasioned by delay at the hands of the Board, the matter would be different. But such is not pleaded nor shown here and, indeed, it is difficult to envisage in the case of a fresh application for certification at an unorganized work place how delay in the issuance of a certificate could be prejudicial to the employer respondent with respect to which bargaining rights are sought.

9. In circumstances somewhat analogous to those here present, it has been argued that an arbitral award issued by an arbitrator outside of the time limit stipulated by the governing agreement or statutory enactment is a nullity, the delay in its issuance having deprived the arbitrator of



jurisdiction. That theory was scotched by the Supreme Court of Canada in *Air-Care Ltd. v. United Steelworkers of America et al.*, (1975) 49 D.L.R. (3d) 467 (S.C.C.). There, contrary to the terms of the governing collective agreement which called for the issuance of a decision within 30-calendar days from the end of hearings, a board of arbitration failed to issue its decision for almost 12 months from the close of hearings, and six months from the date of final written submissions. Speaking for the full Court, Mr. Justice Dickson stated at p. 471: "The right of a party should not be lost or in any way prejudiced as the result of dilatory conduct on the part of a board over which it has little or no control." See, as well, the decision of the Divisional Court in *Re Metropolitan Toronto Board of Police Commissioners and Metropolitan Toronto Police Association (Unit B) et al.*, (1973) 37 D.L.R. (3d) 487. Here, although loss of jurisdiction is not pleaded, it is surely the applicant rather than the respondent whose rights could be said to have been prejudiced as a result of delay in the issuance of the Board decision. Reconsideration on the grounds sought could only compound that prejudice.

10. It is to be recalled that as the Board stated in *Journal Publishing Company of Ottawa Ltd.*, *supra*, it is particularly where representation rights are at issue that the need for certainty and finality in Board decisions becomes obvious. For there, the initial decision of the Board conferring bargaining rights grounds the entire collective bargaining relationship which is to flow out of it. Thus, reliance on the vitality of the original decision is particularly great and to be disturbed only in the most unusual of circumstances. Such circumstances are not here present. Accordingly, the Board rejects the argument that delay occasioned by its own dilatory conduct suffices to ground exercise of its reconsideration power.

11. For all of the foregoing reasons this request for reconsideration by the Board of its decision of June 30, 1987 is dismissed.

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**2523-87-G** The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, on behalf of itself and its Local Union 463, Applicant v. The Electrical Power Systems Construction Association (EPSCA) and **Ontario Hydro**, Respondent

**Construction Industry Grievance - Hydro questioning the medical fitness of worker sent from hiring hall - Worker securing medical certificate and allowed to work three days later - If reasonable grounds exist to question a worker's medical fitness, no obligation on employer to compensate the employee while fitness in doubt - Grievance claiming lost wages dismissed**

**BEFORE:** Ken Petryshen, Vice-Chair, and Board Members Janet Trim and H. Kobryn.

**APPEARANCES:** A. J. Ahee and C. Burrows for the applicant; Robert J. Atkinson and John Tomlinson for the respondent.

**DECISION OF KEN PETRYSHEN AND BOARD MEMBER JANET TRIM;** January 26, 1988

1. This is a referral of a grievance to the Board pursuant to section 124 of the *Labour Relations Act*.
2. The applicants and the respondents are bound by the terms of a collective agreement

which has a term of operation from May 1, 1986 to April 30, 1988. The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 ("Local Union 463") grieves that Ontario Hydro ("Hydro") has contravened the terms of the collective agreement in its treatment of Alan Kimoto. On July 6, 1987 Kimoto was referred to Hydro's Darlington location. After spending some time filling in employment forms, Kimoto was interviewed by two nurses employed on the Darlington site by Hydro in its First Aid office. Since Kimoto advised them that he had a problem with his shoulder, a determination was made by the nurses that he should not start working for Hydro until he was able to satisfy Hydro of his fitness to perform the duties required of his job. The nurses gave Kimoto a form and asked him to have the form filled out by a physician and returned to them within 48 hours. Kimoto was unable to return with the completed form until July 9, 1987. The Board is satisfied that the delay in returning with the physician's statement was not attributable to any lack of due diligence on Kimoto's part. The nurses reviewed the form and determined that Kimoto was able to perform the duties required of a plumber, and he was allowed to start work commencing in the early hours of July 10, 1987.

3. The union did not take the position that Hydro had no right to question the medical fitness of employees who are sent from the hiring hall, nor did counsel for the union argue that the nurses acted unreasonably in the circumstances when it was determined that it was necessary for Kimoto to secure some medical evidence of his physical condition. However, counsel for the union argued that since Kimoto was ultimately able to provide Hydro with evidence that he was physically fit to perform the job duties required of him, Hydro was required to pay Kimoto from that point in time when he initially would have been scheduled to work for Hydro. Since Kimoto spent some time on the employer's premises during the pre-employment assessment, the parties agreed, without prejudice, that the grievance should be allowed to the extent of awarding Kimoto four hours' pay at his regular rate. After recessing to consider the evidence and the parties' submissions, the Board orally ruled at the hearing on January 6, 1988, H. Kobryn dissenting, that the grievance should be dismissed in all other respects.

4. An employer has both the right and the obligation to satisfy itself as to the medical fitness of employees to carry out the work that they will be required to perform. If reasonable grounds exist, an employer is entitled to request an employee to provide a medical opinion in order to remove any doubts with respect to an employee's fitness to perform work. Among other things, the risk of injury to the employee concerned and other employees necessitates such an approach. Once the employee provides the employer with information from which the employer should be in a position to determine that the employee is medically fit to work, the employee should then be allowed to resume work. Cases of this sort usually focus on the issue of whether the employer had reasonable grounds to make the determination that it did. If the reasonable grounds are found not to have existed, a grievance of this sort will succeed. On the other hand, if it is found that the employer has reasonable grounds to take the position that it did, the grievance will be dismissed. If reasonable grounds exist to raise a doubt about an employee's medical fitness, the employer is entitled to deny the employee the right to start working until the employee can provide evidence which should satisfy an employer concerning his or her fitness. During this interim period of time, there is no obligation on an employer to compensate the employee whose physical fitness is in doubt. If one were to accept the union's argument, one in effect would be penalizing an employer for acting reasonably.

5. The union conceded that Hydro acted reasonably when the nurses concluded that Kimoto required some medical evidence to establish his fitness. We are satisfied that Hydro did not act unreasonably in the way in which it required Kimoto to provide evidence of his medical fitness. Kimoto was asked to have a physician of his choice fill out a standard form and to return the com-

pleted form within 48 hours. Kimoto did not object to this procedure at the time. Although the procedures utilized by Hydro in situations where an employee's medical fitness is in issue has changed since the Kimoto incident, we cannot conclude that the procedures used in Kimoto's case were unreasonable. We are satisfied that Hydro did not contravene the collective agreement when it declined to compensate Kimoto for July 7, 8 and 9, 1987.

6. The Board directs Hydro to pay to Kimoto forthwith the amount of four hours' pay at his regular rate in accordance with the parties' agreement. As the Board noted at the hearing, the grievance in all other respects is dismissed.

#### **DECISION OF BOARD MEMBER H. KOBRYN;**

1. My dissent from the majority decision in this case is solely based on principle, for reasons listed below.

2. Employers have consistently made accusations and statements that injured workers would much rather remain on Workers Compensation Benefits than return to work.

3. Wherein, in this case, you have management's cumbersome guidelines which prevented a willing and candid injured worker from immediately returning to work without further loss of earnings, in order to secure a written medical confirmation that he is physically fit to perform heavy duties. In this instant, it took the worker three days to get this medical form signed, with the ensuing loss of earnings.

4. The one positive effect of this grievance was that management subsequently amended its cumbersome guidelines wherein they allowed the First Aid nursing staff to telephone the doctor in question to get oral confirmation that the worker is physically fit to return to work. They also amended the medical form to read "fit for regular duties" rather than the wording in the existing form at the time of this grievance reading "fit for heavy duties", which the worker is asked to get signed by his doctor to confirm the oral confirmation. This is now done without the worker losing any work time. Again, a very positive step.

5. On the basis of principle, I would have allowed this grievance.

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**3128-86-R** Pebra Peterborough Employees Association, Applicant, v. **Pebra Peterborough Inc.**, Respondent, v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W. - Canada), Intervener.

Certification - Membership Evidence - Practice and Procedure - Intervener alleging inaccuracies with respect to applicant's Form 9 - Board explaining what Form 9 requires in terms of inquiries to be made by Form 9 declarant and material facts disclosed - Declarants advised to disclose material facts not specifically required by the Form 9 - Form 9 rejected as unreliable - Having rejected Form 9, no membership evidence before Board to which the Board was prepared to give any weight - Application dismissed

**BEFORE:** *Robert J. Herman*, Vice-Chair, and Board Members *J. A. Ronson* and *J. Sarra*.



**APPEARANCES:** *Robert B. Reid, Linda Barry-Hallowell, Don McLean, Darlene Van Volkenburg, Heather Hamilton and Sandra Rutherford* for the applicant; *D. I. Wakely, M. Failes, E. Jiscoot and D. MacDonald* for the respondent; *L. A. MacLean and Maureen Kirincic* for the intervener.

**DECISION OF VICE-CHAIR ROBERT J. HERMAN AND BOARD MEMBER J. SARRA;**  
January 22, 1988

1. In this certification application, the intervener C.A.W. submits that the applicant ought not to be found to be a "trade union" within the meaning of the *Labour Relations Act*, asserts various improprieties with respect to the membership evidence and the Form 9's filed on behalf of the applicant, and alleges that involvement by management of the respondent in the formation and operation of the applicant constitutes breaches of sections 13, 64, 66 and 70 of the *Labour Relations Act*. In its intervention, the intervener also asked that consideration of the application be deferred, given an anticipated build-up of employees in the workplace. As the build-up issue was not pursued in evidence or submissions, we do not propose to deal with it further.

2. In order to deal with the allegations it is necessary to recite the facts in some detail. The respondent's plant in Peterborough commenced operation at the beginning of September 1986, producing side mouldings for automobiles. Almost immediately, the company instituted a practice of holding bi-weekly communication meetings, meetings which employees were expected to attend during their work shifts, and at which management and employees could each discuss some of their concerns or suggestions or have some of their questions answered. Bi-weekly meetings were held for both day and night shifts, the night shift meeting timed to begin at the conclusion of the day shift meeting. When these communication meetings started there was no union presence at the plant, either on behalf of the applicant or the C.A.W.

3. By November the C.A.W. was attempting to organize Pebra's production employees. Organizers for C.A.W. were handing out flyers and information circulars to employees at the plant gate and leaving printed information and blank C.A.W. membership cards in employee common areas such as the washrooms. Although the company knew of the C.A.W. organizing presence, it took no steps to impede the C.A.W. activities nor made any comments against the C.A.W. or other unions. During this period the communication meetings were held as usual. The C.A.W.'s campaign was discussed by employees at the meeting in early November, but management did not comment or attempt to influence employees with respect to signing a C.A.W. membership card.

4. The next communication meeting, November 26, was conducted as usual by the two senior managers of the respondent, Dave MacDonald, Plant Production Manager at the time, and Elizabeth Jiscoot, Director of Personnel at the time. Jiscoot told employees of management's concern that the communication meetings were not as effective as anticipated, either because employees were not speaking, or because the concerns they raised were too minor for communication meetings (for example, a particular employee's concern about receiving a new pair of work gloves). An employee asked about employee associations, asking Jiscoot whether the company had considered an association or committee comprised of both company and employee representatives. A fellow employee, Darlene Van Volkenburg, then volunteered that she thought such an association would be a good idea. Jiscoot answered the first employee by indicating that she knew of two companies in the Peterborough area that had associations which worked well, one of which was the Fisher-Gage Employees Association, and that if people were interested in information on associations or other organizations of employees, she would be happy to provide it, but beyond providing information she could not discuss such matters. The C.A.W. and its organizing campaign was discussed by employees, as it had been at the previous meeting. Again, management made no state-

ments with respect to employee associations, organizations, or unions, other than Jiscot's comments.

5. After the communication meeting Van Volkenburg approached Jiscot and asked her for the information Jiscot had offered to provide. Jiscot advised Van Volkenburg that she did not have the information with her. The next day, as was customary, the minutes of the communication meeting were posted on the company bulletin board. They stated that employees interested in information on committees or associations should contact Van Volkenburg. Several weeks later, Jiscot gave Van Volkenburg the promised information, consisting solely of publications issued by this Board advising employees of their rights under the *Labour Relations Act*. Jiscot made no comments when providing these publications.

6. Shortly before the Christmas holiday period, the company discharged a set-up employee on the assembly line. Numerous employees felt that the company had not treated this employee fairly, and in Don McLean's case, this concern prompted him to become involved in trying to organize his fellow employees. He asked Van Volkenburg if he could read the literature she had obtained. The C.A.W. continued its organizing efforts.

7. In early January, McLean asked Jiscot if he could address employees at the next communication meetings. She agreed, provided McLean thought it would improve the meetings. McLean told her he wanted to try to motivate employees and to encourage them to communicate more.

8. The next communication meetings were held on January 14. That morning McLean asked Van Volkenburg if she would be willing to assist him in researching and considering whether employees ought to form a committee, union, association, or other organizational group. Van Volkenburg agreed and later in the morning told McLean that Sandra Rutherford and Heather Hamilton would also be willing to assist. At the day shift communication meeting that afternoon, MacDonald and Jiscot first dealt with company business and other matters. When the meeting was turned over to employees for questions, McLean indicated he wanted to speak to employees about unions or associations. MacDonald and the other managers thereupon left the room. McLean said he felt there was a need for organizing and that he was forming a research committee to inquire into the matter and to consider whether employees ought to form an employee group or association or some other entity. McLean also told employees that he would be in touch with the Fisher-Gage Employees Association, and perhaps someone from that association would come and speak to them. He told them that Van Volkenburg, Hamilton, and Rutherford were assisting him. He concluded by asking employees to keep the issue of forming a union or association confidential, until his committee could advise employees of the research results. At that point the day shift meeting ended. The meeting for night shift employees occurred immediately thereafter, and McLean addressed those employees, to the same effect, before MacDonald and the other managers reappeared.

9. The next day the C.A.W. handed out a new flyer at the plant gate. In it the C.A.W. noted that "there is talk of an association, [sic] it is true that all workers need an independent voice to speak on their behalf. Associations are rarely an independent voice; companies often manipulate them.". Attached to each flyer was an Application for Membership card in the C.A.W., together with a self-addressed stamped envelope, and employees were asked to sign the card, enclose a one dollar initiation fee, and mail the card and money to the named C.A.W. representative.

10. That evening McLean phoned John Lunt, President of the Fisher-Gage Employees Association, and arranged for Lunt and Dave Lozon, the past president, to meet with the commit-



tee of McLean, Rutherford, Hamilton and VanVolkenburg. They met and discussed employee associations, unions and the relative merits of each, and learned how the Fisher-Gage Employees Association originated and operated. The four committee members decided to advise employees that they favoured an employee association, like the one at Fisher-Gage, consisting solely of the employees of the respondent, and not associated with any established union. The committee did not favour forming a committee of employees and management representatives.

11. The next day, January 16, McLean, Rutherford and Hamilton left the plant at lunch, having advised their respective supervisors that they needed time off for personal business, and arranged for a bank account in the applicant's name, the printing of membership applications, and a meeting place for employees on January 17th. For their model for an application card, they used the C.A.W. card that had been freely and regularly distributed to employees during the C.A.W.'s organizing campaign. When they returned to the plant, McLean asked Hamilton, Rutherford and VanVolkenburg to tell employees about the meeting the next morning at the Sir Sanford Fleming Pub and Common Room. McLean also told them not to discuss the meeting or anything about it with any member of management, nor allow management to learn of the meeting. Management in fact remained unaware of the meeting. One employee, Bonnie Bolger, expressed reluctance to McLean about attending as she was scheduled to work the next morning. McLean told her that she couldn't be discriminated against for becoming involved in organizing, and that MacDonald would not "kick your ass" for going. Board Member Sarra dissents with respect to this view of the conversation between Bolger and McLean, while Board Member Ronson concurs in this finding.

12. A large number of employees attended the meeting at Sir Sanford Fleming that Saturday morning. Approximately eight to ten of the employees had left their work shift at the plant to attend. No member of management was at the plant, and the employees simply stopped working, punched out, and went together to the meeting. Only two employees scheduled to work that morning remained at the plant. When MacDonald arrived, after the others had left, he asked the 2 remaining employees where the others were. They responded that they would rather not say. MacDonald was the only manager at the plant that day, and neither he nor any other manager gave permission to employees to attend the meeting.

13. At the meeting, McLean acted as chairman and described to employees their rights under the Act, reading large portions of the Board's publication, *A Guide to the Labour Relations Act*. After explaining employee rights to organize and other labour relations matters, McLean noted that each individual still had to make the decision, whether to join the C.A.W., an employee association, or neither. Lunt, from the Fisher-Gage Employee Association, then spoke about how his association worked and some of the benefits of such an arrangement. After Lunt answered questions, McLean told employees that he favoured an employee association composed only of employees at Pebra, and not allied with an official union. He said he had membership cards for joining the applicant, and interested employees could sign up at the meeting.

14. Membership cards were then handed out to employees and many of them signed and handed one dollar together with the signed cards to either Hamilton or Rutherford. In return, they received a receipt for the one dollar payment (as did all employees when they paid their dollars).

15. The meeting then adjourned. Employees scheduled to work returned to the plant, punched back in, and completed their shifts. When they returned, MacDonald asked one of them where they had been. Rather than responding, the employee walked away. MacDonald retorted that he was not sure what was happening, but that they would speak about it on Monday. He learned later that weekend that an organizing meeting had been held, and he contacted legal counsel. As a result of conversations with counsel, he did not subsequently speak to employees about



their absence that Saturday morning, nor was any discipline imposed. These employees were never paid for the time they did not work that morning.

16. The four committee members tried to obtain other memberships before they applied for certification. McLean told his three assistants to be discreet in their attempts to sign employees, to not sign anybody up on company time and most importantly, to keep such organizing attempts hidden from any member of management. On the evening of January 20th, though none of them were on shift at the time, they sat in the employee cafeteria and obtained additional memberships during employees' lunch or coffee breaks. No member of management was aware that the four of them were in the cafeteria. Other times, Rutherford on her own solicited and obtained further memberships and the accompanying dollars.

17. On January 23rd, McLean, Hamilton, and VanVolkenburg took the afternoon off work, again stating personal business as the reason, and came to Toronto and filed an application for certification. As will be seen shortly, this was the first application filed by the applicant, and not the application before the Board in the instant proceeding. Before filing the application, the three of them each read the application and the Form 9, the signed membership cards, and the receipt books that Hamilton had brought with her. McLean then signed the Application, which listed the company's address and phone as the address of the applicant, as well as for the company. He also signed Form 9, which reads in part as follows:

**"3. (Where the documentary evidence consists in part of receipts or other acknowledgements of the payment on account of dues or initiation fees.)** On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgments of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgment of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on his receipt or acknowledgment of payment as collector, EXCEPT IN THE FOLLOWING INSTANCES:"

The Form 9 signed by McLean indicated no exceptions. Both forms were then filed with the Board.

18. After receiving a hearing date from the Board, McLean met with Lunt and Lozon to discuss drafting a constitution for the applicant and electing officers. A constitution was prepared based on a copy of the Fisher-Gage Employees Association constitution provided by Lozon. At a meeting at the Miss Diana Motor Hotel on February 6, employees who had signed memberships voted to adopt the constitution, and by secret ballot an executive was elected.

19. The Board hearing was scheduled for February 13th. Earlier that week, McLean received a copy of the intervention filed by the C.A.W. He discussed the intervention with Lunt, who suggested that counsel be retained, and referred McLean to the applicant's current counsel. The day before the hearing McLean met with counsel and they discussed the allegations contained in the intervention including an allegation that the membership cards had been ambiguous and misleading. That allegation was based on the fact that although the heading on the membership cards read "Pebra Peterborough Employees Association", the text below the heading read "I hereby apply for membership in, and authorize Pebra Peterborough ...", the name of the employer. Counsel was authorized by McLean to withdraw the application and it was. The next C.A.W. flyer indicated that the applicant had withdrawn its application.

20. The next meeting was Sunday afternoon, February 15, at the Miss Diana Motor Hotel, to explain to employees why the application had been withdrawn, to get members to sign new

membership cards, and to sign up new members. McLean had with him blank applications for membership, edited to remove any ambiguity as to the organization employees were being asked to join. McLean told employees that if they had already signed a card and paid a dollar, they need not pay the dollar again. If employees were signing for the first time however, they were required to pay a dollar. The blank cards were then handed out by Hamilton and Rutherford, and the two of them sat at a table at the front of the room while employees brought the signed cards up to them. Once employees who had re-signed (ie. signed a second replacement card) had deposited their cards in a pile on the table, Hamilton and Rutherford sub-divided the cards and each of them signed approximately half of the cards as collector, without regard to whether the person signing as collector had actually collected the dollar from the signing employee for their first card. With respect to how or why they signed as collectors acknowledging receipt of the \$1.00 when the signing collector might not have received it, Rutherford testified that she and Hamilton didn't know if they had to re-sign cards they had signed the first time, so they each signed some of the cards. Hamilton testified that they had a list of employees who had signed the first time, and they were therefore able to determine from which employees they needed a dollar. These new cards read, in blank, as follows:

# OFFICIAL APPLICATION FOR MEMBERSHIP

## PEBRA PETERBOROUGH EMPLOYEE'S ASSOCIATION

I hereby apply for membership in, and authorize P.P.E.A., its agents or representatives, to act for me as my exclusive representative in collective bargaining, in respect to all the terms and conditions of my employment and to enter into contracts with my employer covering all such matters.

Date ..... 19.... X .....  
Signature of Applicant

(OVER)

\$1.00 Initiation Fee Received by .....  
Signature of Collector

I hereby certify that I paid the above amount

Date ..... 19.... X .....  
Signature of Applicant

The date at the bottom left of the card, below "I hereby certify that I paid the above amount", was dated the date the card was signed. For re-signed cards, this was not the date the dollar was paid.

21. During the next few days, Hamilton and Rutherford collected further cards. Hamilton obtained both replacement cards and new cards in the cafeteria on February 17th, and other times and places. Rutherford was not with Hamilton on all of these occasions. All the cards show either Hamilton or Rutherford as collector. Hamilton testified that on these occasions when she obtained re-signed cards, and signed them as collector acknowledging payment to her of the \$1.00, the employee "handed the card to me and I signed it and away they went". As with the re-signed cards obtained at the February 15 meeting, she signed as collector without consideration as to whether she had been the person who received the \$1.00.

22. The instant application was received by the Board on February 18th, and was followed shortly thereafter by a Form 9, again signed by McLean as President of the applicant, which again disclosed no special circumstances or exceptions. With respect to this Form 9, and McLean's personal knowledge of the circumstances of the collection of cards, McLean testified that he had had

very little to do with the collection of cards, or the re-signing of the membership cards, as only Hamilton and Rutherford had collected them. He also testified that he could not answer whether the person who had signed as collector on the second re-signed cards, for which no additional dollar was paid, had signed the original card as collector. McLean in effect admitted in testimony that when he signed this Form 9 he was unaware of whether the person signing as collector had actually collected the dollar with respect to the applicable card. McLean also testified, with respect to cards signed by first time members and accompanied by a dollar payment, that he had personal knowledge of the signing of only one of those new cards. He had no personal knowledge of the collection of the other new cards. He did not compare the cards with the receipt books before signing the Form 9. He also stated that he had not asked the two collectors, prior to signing this Form 9, whether each of them had collected the dollar for the cards which they had signed as collector.

23. Rutherford in turn testified that she had no discussions with McLean whatsoever with respect to either the first Form 9 filed in this proceeding, or as will be seen shortly, the subsequently filed amended Form 9. Rutherford testified that neither McLean, nor Hamilton (to whom Rutherford had given her cards), had asked her any questions about the collection of cards that Rutherford had signed as collector.

24. The C.A.W. again intervened as it had in the first application, again filing extensive allegations. Those allegations include the statement that at the meeting on February 15th, where employees signed replacement cards to remove the purported ambiguity, the executive "had new applications for membership in the applicant signed by some persons in the audience. No dollars were paid or exchanged upon the signing of these applications for membership."

25. At the first day of hearing, before a differently constituted panel, the Board dealt with a preliminary objection that the intervention was lacking sufficient particulars. The Board orally ruled that further particulars had to be provided, adjourned, and issued in writing the reasons for its ruling in a decision dated March 31, 1987 ([1987] OLRB Rep. March 421). That panel of the Board also set the next hearing dates, indicating that consideration of the merits of the application would begin April 1, 1987.

26. Just prior to April 1, the applicant filed an amended Form 9, again signed by McLean as President of the applicant, which reads in part as follows:

- "3. (Where the documentary evidence consists in part of receipts or other acknowledgements of the payment on account of dues or initiation fees.) On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgments of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgment of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on his receipt or acknowledgment of payment as collector, EXCEPT IN THE FOLLOWING INSTANCES:

#### SCHEDULE 'A'

1. Two collectors accepted payments of \$1.00 as set out on the combined membership card/receipt forms submitted to the Board.
2. The two collectors were present together when all payments were received.
3. Each collector kept a receipt book and gave receipts regarding funds collected by them personally.



4. The two collectors were present together when all combined membership cards/receipt forms were signed by them indicating receipt of the funds.

5. In some instances, the specific collector who signed the combined membership card/receipt form was not the one who personally received the \$1.00 payment."

27. About this Form 9, the only one noting exceptions, McLean testified that it was filed by way of clarification with respect to receiving the dollars for each re-signed membership card. McLean said it was to explain to the Board that the collector who signed the resigned card was not necessarily the individual who had collected the dollar for that employee. When asked by his counsel why this information had not been provided with the first Form 9 filed in this application, McLean said it was because he had had very little to do with the re-signing and collection of cards, so that he could not have answered whether the person who had signed as collector had actually collected the dollar. McLean did also testify that he had discussed the circumstances surrounding the collection of cards with the collectors and counsel prior to, but not at the time of, signing the amended Form 9. We do not find this latter evidence reliable. This testimony was given in response to leading questions from his own counsel. McLean gave no details of the discussion, other than to testify he had discussed "this" with them. However the evidence of Rutherford was that McLean had not discussed with her at all either of the Form 9's filed in this application, nor asked her anything about the cards she had collected. Although Hamilton, the other collector, testified that she had discussed the method of re-signing when the instant hearing was about to begin, she also told the Board that she had not discussed the amended Form 9 with McLean.

28. We turn first to consider the question of the adequacy of the membership evidence and the reliability of the Form 9's. During the hearing, over the objection of counsel for the C.A.W., we entertained the *viva voce* evidence of the Form 9 declarant, McLean, and the collectors Hamilton and Rutherford, with respect to the manner in which they collected the cards and dollar payments, and with respect to the dates on which the dollar payments were collected. In support of accepting such evidence, see, for example, *Maple Leaf Mills Limited*, [1984] OLRB Rep. Oct. 1474, at paragraph 9; *Colautti Construction Ltd.*, [1985] OLRB Rep. May 643.

29. The focus of the Board's Form 9 concerns has been commented upon before. In *Kitchener News Company Limited*, [1980] OLRB Rep. Nov. 1656, the Board wrote as follows:

6. The knowledge which is required as a precondition to signing the Form 8 [now Form 9] Declaration was outlined by the Board in *National Steel Car Corporation Limited*, [1966] OLRB Rep. Jan. 738 at paragraph 13:

It is readily apparent that a person completing Form 9 (now Form 8) must be seized with some type of knowledge in order to satisfy the requirements of item 3 cited above. This knowledge may be personal knowledge (i.e.) knowledge gained by either acting as the actual collector or knowledge gained by being personally present and actually witnessing the transaction between the collector and the member wherein the membership card was signed and payment of money made by the member to the collector.

The other type of knowledge which is acceptable is that knowledge gained from inquiries made of the persons who actually acted as collectors, or the persons who made the necessary inquiries of the actual collectors.

The requirement that inquiries be made is obviously not an onerous one or one that imposes an undue burden on the applicant; however, the requirement is that *inquiries be made. In order that inquiries be meaningful it is obvious that they must be made after the event. Instruction given to collectors prior to the signing of members may be helpful or necessary in the carrying out of an organizing campaign, however, such instructions do not obviate the necessity of making the inquiries required for the proper*

completion of Form 9 (now Form 8). (See *Dominion Stores Limited* case, [1964] OLRB Rep. Dec. 447).

In the instant case, Mr. Storey, prior to completing Form 9 (now Form 8) made inquiries of Mr. Cooke. However, Mr. Cooke had made no inquiries of Mr. Griffin and in turn Mr. Griffin had made no inquiries of other persons who had acted as collectors. It is readily apparent that the inquiries made by Mr. Storey were made of a person who had no direct knowledge of the collectors and the failure of Mr. Cooke and Mr. Griffin to make inquiries frustrated the purpose of Mr. Storey's inquiries. Where the officers of an applicant trade union have themselves frustrated the inquiries made by the person who completes Form 9 (now Form 8) and by their failure to follow through with their own inquiries, render the inquiries made by such persons meaningless, we must find that Form 9 (now Form 8) in such circumstances cannot serve the purpose for which it was intended and in such circumstances is a nullity. In arriving at this conclusion, the Board has noted with approval the *Valley Transportation Company Limited* case, [1963] OLRB Rep. Nov. 448, wherein the Board said at p. 452:

The Board must expect and insist that persons who file applications for membership cards and receipts and Form 9 (now Form 8) as evidence of membership, take all necessary precautions and care to ensure that the information contained therein is true and accurate. The Board is entitled to demand the highest standards of integrity, disclosure, and accuracy on the part of those who submit such evidence and where undisclosed inaccuracies of material facts are later brought to its attention, to take a strict view of them. [emphasis added]

7. The standard enunciated by the Board in *National Steel Car, supra*, has been consistently applied in other cases in which the same issue arose. It is a standard which is well known in the labour relations community, and the cases on point are legion (see for example: *Puretex Limited*, [1972] OLRB Rep. June 676 and cases cited therein; *Stanley Steel Company Limited*, [1972] OLRB Rep. Feb. 181; and *N. D. Supermarket Limited*, [1976] OLRB Rep. March 112; *Triad Triumph Limited*, [1976] OLRB Rep. March 115; *Country Village*, [1976] OLRB Rep. July 373; *The Alexandra Hotel Limited*, [1972] OLRB Rep. Nov. 963; and more recently *Trent Valley Lodge Limited*, [1980] OLRB Rep. June 926). The purpose of the Form 8 inquiry (and the 'second check') that it builds into the system) is equally clear. The Board must place total reliance on documentary evidence--written hearsay, often solicited by inexperienced laymen, yet not revealed to the employer or subject to cross-examination (see section 100 of the Act). On the basis of that evidence, a trade union may be certified as the employees' bargaining agent without recourse to a representation vote. Indeed, unless some specific irregularity is brought to the Board's attention, the Board will normally place total reliance on the Form 8 Declaration and will not undertake any formal inquiry concerning membership documents which appear to be regular on their face. In the present case, for example, the Form 8 problem would never have come to light had it not been for the disclosure of an irregularity which would not have been apparent on the face of either the Form 8 Declaration or the membership card itself. To avoid such problems, the Board has always held that the person signing the Form 8 must be meticulous and comply strictly with its requirements.

30.  
lows:

And in *Grand & Toy Limited*, [1986] OLRB Rep. Sept. 1223, the Board wrote as fol-

"13... In certification proceedings the Board places heavy reliance upon the membership evidence filed by the union. Because of the consequences of the reliance that the Board places on what is a form of hearsay evidence which is not disclosed to the employer and is not subject to cross-examination, the Board requires a high standard of integrity in the nature and quality of the membership evidence filed. It is for an applicant trade union to satisfy the Board that every membership card upon which it relies was signed by the employee on whose behalf it is tendered and that each employee has paid the initiation fee that accompanies it. It is for this purpose that the Board requires (pursuant to Rule 6) a Form 9 declaration concerning membership documents to be filed in every application for certification.

14. The Form 9 declaration is so important that if one is not filed, the Board will give no weight to the union's membership evidence (see for example *Pietrangelo Masonry* [1981] OLRB Rep. Feb. 218). If a Form 9 is filed but it is subsequently revealed either that no inquiry was in fact made by the declarant, or that the declarant failed to indicate in it discrepancies in the membership evidence of which he was aware, the Board may dismiss the application on the basis that no weight can be given to the declaration (see *Bond Place Hotel* [1983] OLRB Rep. Feb. 202). Where there are irregularities or discrepancies noted in the Form 9, the Board's practice is to concern itself with the acceptability of only the cards to which these apply. In addition, where a party has information that the union or anyone on its behalf has either attempted to perpetrate a fraud on the Board with respect to the membership evidence, or have otherwise acted improperly, that party can make those allegations and again the appropriate enquiry can be conducted."

31. Paragraph 3 of Form 9 is the critical paragraph and it is important to understand what it does not require as well as what it does require. It requires that the declarant, in this case the applicant's President, be able to make certain declarations, based either on the declarant's personal knowledge or the inquiries that s/he has made. If the declarant signs the Form based on personal knowledge, then that knowledge must be sufficient to allow the declarant to make the declaration in paragraph 3. It must also be sufficient to ensure that the declarant is aware of any exceptions to the standard declaration. Alternatively, if inquiries are made of collectors and these inquiries form the basis upon which the declarant is possessed of the necessary knowledge, then the inquiries must be made prior to signing the Form and they must be reasonable. The declarant need not inquire with respect to every conceivable event or possibility, but s/he must have made reasonable attempts and reasonable inquiries. What is reasonable will depend on the circumstances and context, but it is clear that an inquiry must be made, whether in a question and answer or a less structured format. Paragraph 3 demands that the declarant attest "*that the persons whose names on the receipts or other acknowledgements of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgement of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on his receipt or acknowledgement of payment as collector, EXCEPT IN THE FOLLOWING INSTANCES:*". As the declarant warrants that the persons named as collectors were those who actually collected the moneys, and that each member for whom there is a receipt had personally paid the money to the named collector, the declarant will not possess sufficient knowledge if s/he merely looks at documents, and (for example) compares each card with a receipt. The declarant must also know personally of the circumstances of the collection or make inquiries about them.

32. The membership cards submitted by the applicant in the instant proceeding do not on their face unambiguously state the date on which the dollars were paid. In this respect the cards disclose the date on which someone *attests* that the money was paid, but not necessarily the date on which the money was *actually paid*. Paragraph 3 of Form 9 does not require on its wording that the declarant indicate if the monies paid on behalf of members were paid other than on the date the applicant signed the membership. There is nothing in the wording of paragraph 3 which demanded that McLean disclose that dollars paid for the membership cards used in the first proceeding were applied in some instances for the membership cards in the instant proceeding. To the contrary, only four matters appear to be required in order for a declarant to properly sign the Form 9. First, the basis of the declarant's knowledge must be personal experience or reasonable inquiries that the declarant has made. Second, the declarant must be able to declare that the collector named on the membership card actually received the payment of money from the member who signed the card. Third, where exceptions exist to the declaration with respect to the second aspect, the declarant must note those exceptions in the particular instance. "EXCEPT IN THE FOLLOWING INSTANCES:" requires an itemized listing of exceptions. Fourth, and of critical importance given the purpose of Form 9 and the Board's reliance on the integrity of the declarant and therefore of



the hearsay membership cards, the declaration must not contain any statements that the declarant knew or ought to have known were material misrepresentations.

33. With these general comments, we turn to the particular facts. The C.A.W. first argues that the timing of the filing of the amended Form 9, after the filing of its intervention attacking the membership evidence, and after the first hearing date in this proceeding, indicates that the true state of affairs would not have come to light but for its intervention. It argues that the applicant is doing no more than filing amended Form 9's as the case develops, to attempt to repair the deficiencies in its case. To sanction such conduct defeats the purpose of the Form 9. The intervener points to the Board's decision in *Collingwood Shipyards, Division of Canada Shipbuilding & Engineering Limited*, [1967] OLRB Rep. June 246, wherein the Board wrote as follows:

"23. Finally, on the subject of disclosure, while no serious argument was advanced based on the fact that the applicant ultimately made full disclosure to the Board, we feel constrained to make it clear that such disclosure is not of the kind envisaged in the decisions of the Board. This is not a case where a responsible officer discovers an irregularity by rank-and-file employee and immediately brings it to the attention of the Board. What we are faced with here is a disclosure of facts, known to responsible persons in the union, only after another party to the proceedings has made allegations respecting the membership evidence. It is surely no answer to say that the allegations in the intervention did not reveal the precise state of affairs. In any event, particulars were demanded and given, and the particulars were reasonably close to the truth. Even in the face of these particulars, nothing was brought to the attention of the Board at the first hearing. Having regard to the evidence and all the circumstances of this case, we are driven to the conclusion that the true state of affairs might well not have come to our attention save for the intervener's allegations. We reiterate we do not regard the disclosures ultimately made here as disclosures within the meaning of the Board's decisions on this point..."

34. It may well be that the true state of affairs would not have been brought to the Board's attention but for the intervention of the C.A.W. And it is clearly true that, notwithstanding charges filed by the intervener about the method of collection of the memberships, no amended Form 9 was filed by the first hearing into this proceeding. When the Board commenced its inquiry, the applicant had not disclosed the exceptions required by Form 9, and had filed a Form 9 that we now know was incorrect and misrepresented events (in that, for example, those signing some of the cards as collector did not collect the dollar for that card). However, no party objected to the Board's receiving the amended Form 9 when it was filed, and the C.A.W. did not raise any concern at that stage about the timing of the filing of the amended Form 9. Based on that amended Form 9, the Board conducted the hearing and parties led evidence and made submissions. Having accepted the filing of the amended Form 9, and having relied upon that Form in the conduct of the hearing, we will not now dismiss the application on the grounds that the amended Form 9 was not filed in a timely fashion. We will, however, consider the timing of the filings in assessing the reliability of the Form 9's and the memberships.

35. The C.A.W. next argues that the amended Form 9 ought to have disclosed that dollars had only been paid by re-signing employees for the first cards (which were not before the Board), and that the dates shown on the membership cards for payment were inaccurate. It relies upon *Collingwood Shipyards*, (*supra*):

"It is clear, then, that a trade union, applying for certification, has the responsibility of satisfying itself that the matters dealt with in Form 8 have been properly investigated by the person completing that form and, further, that any exceptions are duly noted on the form. It is also clear, however, that that responsibility extends beyond the matters enumerated in paragraph 3 of the form, that is, that the collector named on the receipt or other acknowledgement of payment actually collected the money and that the person to whom the receipt was issued, as having paid money towards dues or initiation fees, actually paid the money on his own behalf to the person shown as the collector. This is well illustrated in a recent decision of the Board, as yet unreported-

ed, in the *Frank Licari & Sons Case*, April, 1967, Board File No. 12815-66-R. In that case the membership evidence filed was found to have misled the Board in a number of ways, one of which is set out in the decision in this fashion:

...However, even the one application and receipt filed by the applicant was misleading. One of the requirements of the Board is that the application card be signed and the money be paid within certain time limits in relation to the date of the application. It is therefore important that the date on the card and the receipt be accurate because this date is used by the Board in determining whether the requirements as to time have been met. The date on the card filed in this case was misleading because although it was the date the card was signed, it was not the date on which the money was paid. That had occurred some months previously.

After dealing with other ways in which the membership evidence was misleading, the Board goes on to say:

...As had been pointed out in many decisions, the Board is dependent to a large extent on the documentary evidence filed by the union because it would be an impossible task for it to verify the membership evidence for every individual by conducting a personal inquiry. It is incumbent, therefore, upon unions to be most circumspect with the documentary evidence they file and to make sure that it is accurate in all respects.

• • •

There is one final matter which must be considered. In dealing with the *Licari & Sons Case*, above, we pointed out that the duty to disclose extends beyond the matters set forth in the Form 8. Both that case and the *Valley Transportation Company Limited Case* make it clear that there is a duty on the applicant to make all necessary precautions and care to ensure that the information contained in the membership evidence, as well as the Form 8, is true and accurate. Clearly in this case the receipts filed are not true and accurate. Not only is this so with respect to the collectors but also with respect to the dates on the receipts. These were not the dates on which the money was paid, and we thus have a situation analogous to that in the *Licari and Sons Case*. While counsel for the applicant suggested in argument that the wording of the receipt does not in fact state that money was paid on the date set out in the receipt, having regard to the contents of both the front and the back of the card, we have no doubt that any reasonable person examining the whole card would conclude that the money was paid on the date stated in the receipt. This would be particularly true where the dates on the card and receipt coincide and this was the case for most of the cards submitted in the place and stead of the cards signed prior to March 5."

36. The *Licari and Sons* case referred to in this quote states as follows, at [1967] OLRB Rep. April 57, paragraph 6:

"On applications for certification, the evidence of membership filed in support of the application may take one of two forms, either of which meets the Board's requirements. The first consists of applications for membership in the applicant union together with proof that the applicant has paid at least one dollar to the union. The sad part of this case is that the applicant could easily have met this requirement if it had used different documents to support its position. However, even the one application and receipt filed by the applicant was misleading. One of the requirements of the Board is that the application card be signed and the money be paid within certain time limits in relation to the date of the application. It is therefore important that the date on the card and the receipt be accurate because this date is used by the Board in determining whether the requirements as to time have been met. The date on the card filed in this case was misleading because although it was the date the card was signed, it was not the date on which the money was paid. That had occurred some months previously."

37. These cases support the C.A.W. submissions that the Form 9 declarant must declare certain matters that are not explicitly required by the wording of paragraph 3, or elsewhere, in Form 9, and that one of the circumstances which must be so declared is when the date the

employee signed the membership card is not the date when the dollar was paid. We concur that this information ought to be before the Board, if only because the Board might exercise its discretion to order a representation vote (pursuant to section 7(2)) if the membership evidence or payment of money on behalf thereof occurs more than six months prior to the application. However, we need not decide whether the Form 9 must disclose this, given our decision rejecting the Form 9 on other grounds. But whether or not a declarant must disclose such information, when the membership cards do not unambiguously state the date of payment, and these circumstances are not disclosed on the Form 9, the Board may well take this factor into account in deciding whether to conduct an inquiry, or exercise its discretion pursuant to section 7(2) of the Act to direct a representation vote, or in fashioning some other response.

38. A declarant would therefore be well advised to declare material facts not specifically required by the Form 9. S/he should also declare exceptions with specific reference to cards. In Schedule "A", paragraph 5, of the amended Form 9, McLean declares that "in some instances, the specific collector who signed the combined membership card/receipt form was not the one who personally received the \$1.00 payment". Paragraph 3 of Form 9 requires that exceptions be noted "IN THE FOLLOWING INSTANCES:". While we are not prepared to reject this Form 9 because it did not itemize the particular cards whose collection involved special circumstances, we note that a non-specific disclosure will likely cause the Board to inquire into the circumstances of all the cards filed. Only through such a comprehensive inquiry would the Board have the knowledge of which cards were collected according to the disclosed exceptions. Without this evidence, the Board would not be able to decide which cards it could rely upon in support of the application.

39. As well as the specific disclosures not made, we are concerned with the knowledge McLean had when he signed the amended Form 9. McLean was not present and did not have personal knowledge of the circumstances of the collection of all cards. With respect to the requisite inquiries, we cannot accept that the conversation in counsel's office with the collectors amounted to "reasonable inquiries". As noted, Hamilton, one of the collectors, testified that she never discussed the Form 9 with McLean. The other collector, Rutherford, gave all her cards to Hamilton who in turn gave them to McLean, but she testified that McLean never asked her anything about her cards and neither did Hamilton. Rutherford further testified that McLean never examined the receipts himself. Both collectors deny, therefore, that McLean inquired of them. These circumstances alone would cause us to reject the Form 9.

40. The Form 9 also materially misrepresents what occurred, and McLean knew or ought to have known this. Paragraph 2 of Schedule "A" states that "the two collectors were present together when all payments were received." The evidence of the collectors disclosed that both collectors were not always present when one or the other of them signed up new members and received dollar payments for those new cards (see paragraph 21 *supra*). Paragraph 4 of Schedule "A" declares that "the two collectors were present together when all combined membership cards/receipt forms were signed by them indicating receipt of the funds." But they were not always present together when new cards were signed, dollars received, and the receipt portion of the membership cards signed (which the evidence indicated was all done at the same time for new members), and paragraph 4 must therefore be false also. Given the circumstances under which the cards and dollars were collected, these two inaccuracies are both material. Any reasonable inquiries of the collectors would have or should have disclosed these facts.

41. In the result, we are satisfied that proper inquiries were not made, that the first Form 9 before us is incorrect, and that two of the statements on the amended Form 9 are false and the declarant ought to have known they were false. We therefore reject the Form 9's as improper and unreliable.



42. Having rejected the Form 9's on the basis noted above, there is no membership evidence before the Board in this application to which the Board is prepared to give any weight and accordingly the application must be dismissed. As the Board noted above in the excerpts from *Kitchener News Company Limited*, and *Grand and Toy Limited*, a Form 9 Declaration is critical to the integrity and fairness of the certification process. Where the Board is asked to certify trade unions on the basis of hearsay membership evidence, without disclosing to the employer such evidence or allowing cross-examination on it, a high standard of integrity and reliability must be maintained. Both the hearsay nature of the membership evidence and the employer's inability to examine this evidence demand safeguards to insure its reliability. One safeguard is the Board's comparison of the signatures of applicants for membership with the specimen signatures provided by the employer for each such applicant. Another safeguard, both authorized and demanded by the regulations and the requirement that Form 9 be filed (see Rule 6 of the Rules of Procedure, Regulation 546 under the Act), is that someone *other than the individual applicant* attest in writing, by signing and filing a proper Form 9, that the applicant has in fact applied for membership and that the collectors have received the application funds on behalf of the trade union.

43. As the Board noted in *Grand and Toy Limited*, *supra*, and in numerous other cases, the Form 9 Declaration is considered so important by the Board that if one is not filed, the Board will give no weight to the union's membership evidence and the application will be dismissed. Consistent with this principle, if a Form 9 Declaration is filed but the Board determines that it is not a proper Form 9 Declaration, then the Board will also give no weight to the union's membership evidence and will reject the application. For membership evidence to be acceptable, it must not only contain the requisite elements and be filed by the terminal date, but must be supported by a proper Form 9. A Form 9 will be improper when the Board concludes that the declarant either did not possess the requisite personal knowledge to sign the form, or did not engage in the necessary reasonable inquiries as a prerequisite to signing the form. The Form 9 will also be improper if the declarant knew, or ought to have known, either that certain matters ought to have been disclosed, but were not, or that some of the disclosures constitute material misrepresentations. At the same time, there may be circumstances where the Form 9 is subsequently determined to be inaccurate, but nevertheless remains proper; for example, the Board is satisfied that the declarant made reasonable inquiries but those inquiries did not disclose exceptions or problems with the membership evidence and accordingly the declaration does not note such exceptions. In this latter circumstance, the declaration itself would be proper (though inaccurate) in that the declarant made the necessary inquiries and disclosed what the declarant knew or ought to have known. Any misinformation or lack of information provided by the person of whom inquiries were made in such a circumstance would not reflect upon the sufficiency or propriety of the Form 9 itself, and accordingly *viva voce* evidence might well satisfy the Board that the membership evidence in question is reliable. Again, such *viva voce* evidence is only admissible in certain circumstances: see paragraph 28, *supra*. But where no Form 9 is filed, or having been filed is found not to be proper in the sense that inquiries were not made, or exceptions or matters that should have been noted are not noted or inaccurately noted, the membership evidence will not be properly attested to as required by the regulations, and the membership evidence will be given no weight.

44. Quite apart from the fact that Rule 6 requires such a Form 9 to be filed, fairness to the parties and the integrity of the process demands such a Board response when a proper Form 9 is not filed. It is not a question of punishing the transgressing party, but of ensuring that both the Board and the parties have confidence in the integrity and fairness of the system and the certification process. Any such confidence would be seriously undermined if the Board were to conclude that a Form 9 was improper in one of the respects noted above, but nevertheless were to rely upon the *viva voce* evidence to find that the membership evidence was adequate and reliable. Were the Board to do so, there would be little incentive for Form 9 declarants to file proper Form 9's or

make the necessary inquiries, since at worst an intentionally misleading or negligently inaccurate Form 9 would lead to the Board conducting its own inquiry, and at best, the Board might never discover the problems with the membership evidence. The requirement under the Rules that a Form 9 be filed, and the Board's insistence that it be a proper Form 9, provides the necessary deterrent to such potential abuse.

45. For these reasons, the application is hereby dismissed, without prejudice to the right of the applicant to reapply for certification: see, for example, *Leco Industries Limited* [1979] OLRB Rep May 404. In light of our decision dismissing the application, it is unnecessary to deal with the issues of "trade union" status and management support.

#### **DECISION OF BOARD MEMBER JAMES A. RONSON;**

1. I cannot agree with the reasoning of my colleagues. It seems to me that the majority decision emphasizes form over substance with respect to this application for certification.
  2. In a normal certification case, the Board accepts and relies on hearsay evidence of union membership. The form of this evidence is by way of written applications for membership in the union which are filed with the Board. Further, the Board requires that a responsible representative of the applicant union enquire and verify that the membership application cards were collected according to established Board procedures, and to sign and file a declaration (Form 9), with the Board outlining the results of those enquiries.
  3. Normally, at the certification hearing the Board will not allow a general enquiry by an employer or an objecting employee into the collection of membership evidence. The Board may conduct its own examination with respect to a specific membership application card but only when the card is subject to specific challenge by way of written allegations and particulars filed with the Board.
  4. In this case, as a result of written allegations and particulars filed by the Intervener union (CAW - Canada), the Board heard days of evidence concerning the formation of the Applicant and the collection of its membership evidence. With respect to its status, I am satisfied that the Applicant is a trade union as defined by the *Labour Relations Act*.
  5. We have received *viva voce* evidence, the "best evidence", concerning the collection of the membership application cards. It cannot be ignored in favour of dismissing the application because of a Form 9 that is defective. Because we have received the best evidence the Form 9 becomes irrelevant and we have to decide the case on the basis of the *viva voce* evidence before us.
  6. Based on the *viva voce* evidence of the collectors of the membership cards, I am satisfied that the membership evidence was collected in a manner consistent with the requirements of the Board and the cards express the voluntary desire of those persons who signed them.
  7. More than 55% of the employees have voluntarily signed applications for membership in the applicant. Subject to the usual second check of these cards by the Board, I would issue a certificate to the applicant union.
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**2193-87-R Ontario Catholic Occasional Teachers' Association, Applicant v. Sault Ste. Marie District Roman Catholic Separate School Board, Respondent**

**Bargaining Unit - Certification - Whether occasional teachers teaching in schools pursuant to Part XI of the *Education Act* should be excluded from an occasional teacher bargaining unit - Only one employee in this category and employee indicating preference for union - Broader based unit appropriate - Certificate issuing**

**BEFORE:** *R. O. MacDowell*, Alternate Chair, and Board Members *R. M. Sloan* and *D. A. Patterson*.

**APPEARANCES:** *Bernard Hanson*, *Ray Fredette* and *Sandy MacDonald* for the applicant; *Steven F. Wilson* and *Claude Levac* for the respondent.

**DECISION OF THE BOARD;** January 18, 1988

1. This is an application for certification. The applicant seeks to represent a bargaining unit composed of all occasional teachers employed by the respondent in its schools in the District of Algoma. Occasional teachers are called in to work on an as-needed basis, whenever the regular classroom teacher is absent for a temporary period. It is common ground that the labour relations and collective bargaining of occasional teachers is regulated by the *Labour Relations Act*. They are not excluded from the *Labour Relations Act* by section 2(f) because they are not "teachers" as defined in the *School Boards and Teachers Collective Negotiations Act, 1975*, R.S.O. 1980, c.464 ("Bill 100").
2. There is no dispute that the applicant is a "trade union" within the meaning of section 1(1)(p) of the *Labour Relations Act*, and the Board so finds. Nor is there any dispute that this certification application is "timely". The parties do disagree about the description about the "appropriate bargaining unit".
3. As we have already mentioned, the union seeks a bargaining unit encompassing all occasional teachers. The employer seeks to exclude those occasional teachers teaching in schools pursuant to Part XI of the *Education Act*. Part XI provides for schools and programs designed to meet the educational and cultural needs of French-speaking students and the local French community.
4. The employer relies on the decision of the Board in *Le Conseil Scolaire d'Ottawa*, [1985] OLRB Rep. July 1090. In that case, *L'Association des Enseignantes et Enseignants Suppléants* sought to represent a bargaining unit comprising the occasional teachers working in the respondent employer's six French language secondary schools established pursuant to Part XI of the *Education Act*, and the Board determined that this employee grouping constituted a unit of employees appropriate for collective bargaining. It is important to note, however, that the Board in that case did not find that a broader-based bargaining unit encompassing all occasional teachers would be inappropriate; moreover, it would appear that in other cases, involving other school boards, the Board has, for collective bargaining purposes, grouped occasionals teaching in Part XI programs together with their professional peers. There is no evidence before us of any labour relations problems arising from either determination.
5. The applicant has filed documentary evidence of membership on behalf of approximately 70 per cent of the employees in the bargaining unit however it is described. At the time the application was made there was only *one* "occasional teacher" teaching in a Part XI program. That



occasional teacher has indicated a desire to be represented by the applicant for collective bargaining purposes. She has expressed no objection to being included in a bargaining unit together with the other occasional teachers who are her professional colleagues. If we were to accept the employer's bargaining unit description, of course, she would be denied that opportunity.

6. Counsel for the employer submits that the Legislature has increasingly recognized the importance of French language programs for Ontario's Francophone community. The employer has altered its administrative structure in order to recognize this important new responsibility. There are now French language trustees, a French language educational council and administrative staff concerned with the development of French language programs. The employer argues that there is a real likelihood that, in the future, as those programs develop, there will be a need for more *certified* occasional teachers - even though, at the present time, there is only one. Counsel points out that, even now, there are about 12 *non-certified* "instructors" (i.e. persons who would not be "occasional teachers" within the meaning of the *Education Act*) who are involved in French language education. The employer submits that any concerns about the collective bargaining rights of Ms. Refcio (the single Part XI occasional teacher) could be resolved by indicating that she could appropriately be included for collective bargaining purposes in a bargaining unit with these non-certified "instructors" - although, of course, none of those individuals has expressed any appetite for collective bargaining, nor is there any precedent for including such individuals in a bargaining unit with occasional teachers. Moreover, it is conceded that these other instructors have a different educational background, different certification, and different conditions of employment. Conversely, although Ms. Refcio teachers a different subject matter, her terms and conditions of employment are identical to those of the other occasional teachers.

7. At paragraph 28 of the Board decision in *Le Conseil Scolaire d'Ottawa* the Board made these observations:

While broader-based bargaining units can sometimes contribute to collective bargaining stability and fragmentation can sometimes lead to collective bargaining problems, the Board has not adopted and, in our view, should be reluctant to adopt any rigid, *a priori* assumptions about what is appropriate - at least in the absence of a well-established body of collective bargaining practice in similar circumstances. Section 1(1)(b) of the Act clearly contemplates that the bargaining unit can consist of a "sub-division" of the employer's enterprise. The Board's task in any particular case is to determine whether the unit applied for is, in all the circumstances, "appropriate". (See generally *Board of Education for the City of Toronto*, [1970] OLRB Rep. July 430; *Ponderosa Steakhouse (A Division of Foodex Systems Limited)*, [1975] OLRB rep. Jan. 7; *Canada Trust Co. Mortgage Company*, [1977] OLRB Rep. June 330; *K-Mart Canada Ltd.*, [1981] OLRB Rep. Sept. 1250; *Kidd Creek Mines*, *supra*; and, more recently, *The Hospital for the Sick Children*, [1985] OLRB Rep. Feb. 266.) In particular circumstances, the board has found a single-branch plant to be appropriate, an office or production employee unit to be appropriate, a full-time or part-time employee unit to be appropriate, a "craft" employee unit to be appropriate, or even (although rarely these days) an appropriate unit consisting of a single "department" in the employer's enterprise. The determination of the "appropriate bargaining unit" is essentially a policy-laden decision, based upon (but not limited to) an assessment of such considerations as: whether the employees have a community of interest, having regard to the nature of the work performed, the conditions of employment, their skills, and the employer's administrative structures; geographic circumstances; the employees' functional coherence, interdependence or interchange with other employees of the employer; the right of employees to a measure of self-determination; any likely adverse effects to the collective bargaining process that might flow from the proposed bargaining unit or from the fragmentation of employees into several units, and so on. Simply put, the question is whether the proposed bargaining unit encompasses a sufficiently coherent subdivision of the respondent's employees to permit viable collective bargaining. The employer's concerns are entitled to consideration, but the unit which best suits the employer's interests, objectives, or administrative convenience will not necessarily be the appropriate unit - not least because in some cases one of the employer's objectives may

well be to avoid collective bargaining altogether or limit its effectiveness. It is a question of balance.

We agree with that general approach; for here, too, it is a question of balance.

8. If the employer had a number of occasional teachers working French language programs or schools, an applicant union might well be able to establish that those employees constituted an appropriate collective bargaining unit. That was the case in *Le Conseil Scolaire d'Ottawa*. It does not follow, however, that a broader-based bargaining unit would not also be appropriate - or even, from some perspectives, more appropriate. The formula, we think, is best expressed in the words of the Board in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266: "Does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer". In the instant case, the answer to that question is clearly yes. And the practical effect of the employer's position is to deny Ms. Refcio access to collective bargaining and representation by the bargaining agent that she has chosen. We do not lightly embrace that option.

9. There is an industrial analogy which may be apposite. Where an enterprise employs both full-time and part-time employees, the Board will often separate them for collective bargaining purposes if one party or the other makes this request. On the agreement or request of the parties the Board will also generally certify a single bargaining unit including both full-time and part-time employees. However, where an application is made for a composite bargaining unit, that request is resisted, and there is only one part-time worker employed at the time the application is made, the Board will typically defer to the wishes of that single employee with respect to representation. We take the same approach here.

10. In the circumstances, we are satisfied that the bargaining unit description should not exclude occasional teachers employed to teach pursuant to Part XI of the *Education Act*.

11. Having regard to the foregoing, the Board finds the following unit to be appropriate for collective bargaining:

All occasional teachers employed by the respondent in its schools in the District of Algoma save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*.

For the purpose of clarity, the term "occasional teacher" in this description has the meaning assigned to it by clause 1(1) 31 of the *Education Act*.

12. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on December 2, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

13. A certificate will issue to the applicant.

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**1251-87-R Labourers' International Union of North America, Local 183, Applicant v. Street Construction Limited, Respondent**

**Bargaining Unit - Certification - Construction Industry - Bargaining unit of construction labourers - Inappropriate to grant clarity note referring to truck drivers and machine operators - Certificates issuing**

**BEFORE:** *Inge M. Stamp*, Vice-Chair, and Board Members *R. W. Pirrie* and *C. A. Ballentine*.

**DECISION OF THE BOARD;** December 31, 1987

1. This is an application for certification made pursuant to the construction industry provisions of the *Labour Relations Act*.

2. The Board, differently constituted, issued a decision on August 27, 1987, which stated in paragraph 8:

8. In these circumstances, the Board directs the Registrar to list this application for hearing before a panel of the construction division of the Board for the purposes of receiving the evidence and representations of the parties respecting whether the Board should find the bargaining unit sought by the applicant to be appropriate for collective bargaining pursuant to section 144(1) of the Act, and on all other matters arising out of and incidental to this application.

3. The bargaining units sought by the applicant are:

all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario save and except non-working foremen and persons above the rank of non-working foreman;

all construction labourers in the employ of the respondent in the Municipality of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman; and

all employees save and except construction labourers, in the employ of the respondent, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

4. The applicant is seeking two bargaining units; one bargaining unit pursuant to section 144(1) of the *Labour Relations Act* with two certificates - one ICI and one for all other sectors, Board Area 8, excluding ICI. The applicant is also seeking a second bargaining unit for all employees in Board Area 8, excluding labourers and ICI.



5. After considering the parties' submissions with respect to the applicant's request for an all employee unit, the Board ruled that it would not depart from its usual practice of describing non-craft units in terms of the trades on the job at the date of application as outlined in Practice Note No. 11.

6. At this point, the applicant requested amendment of its bargaining unit pursuant to section 144(3) to "all machine operators and truck drivers in the employ of the respondent on the date of application excluding ICI".

7. The respondent stated that it had no problem with that being the appropriate way to describe the bargaining unit if anyone was working in it, and agreed to the applicant seeing the list.

8. The applicant did not challenge the list but stated that in view of the fact that no one is listed as a truck driver or machine operator, a clarity note would be appropriate.

9. We see no need to set out the submissions of the parties in detail with respect to the appropriateness of a clarity note. The thrust of the applicant's submissions reflected the concern that labourers would be beyond the scope of the collective agreement while engaged in operating a backhoe or loader, and if there was intermittent machine operating and truck driving on the date of application a clarity note would be appropriate, citing *Ninco Construction Ltd.*, [1982] OLRB Rep. Nov. 1692.

10. After making their submissions, the parties agreed as follows:

- i) applicant would withdraw its request for an amended bargaining unit under section 144(3);
- ii) the only outstanding issue between the parties is the appropriateness of a clarity note and for the Board to issue an interim certificate as well as appoint a Labour Relations Officer to enquire into the nature of the work performed on the day of application.

11. Section 6(2) provides that where there is a dispute as to the *composition of the bargaining unit* the Board may issue an interim certificate. There is no dispute as to the composition of the bargaining unit in the instant application. There are no challenges to the list and the only remaining issue is the appropriateness of a clarity note. The clarity note, if granted, would not affect the composition of the bargaining unit or the certificate. In the circumstances, an interim certificate is not appropriate.

12. It appears from the submissions of the parties that there is incidental truck driving and/or equipment operating performed by employees in the bargaining unit. However, there is no dispute that the majority of the time the employees performed labourers work on the day of application. If the majority of their time was spent truck driving or equipment operating the Board would have found them to be operating engineers or truck drivers. See *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220.

13. Even if there was other work performed intermittently on the date of application by the employees in the bargaining unit, it would be inconsistent with the Board's policy to grant the type of clarity note requested by the applicant. In *Ninco*, *supra*, the clarity note referred to employees engaged in cement finishing work on the date of application. In *Ninco*, *supra*, the Board used the clarity note to expressly indicate that the bargaining unit of construction labourers included persons engaged in cement finishing. The applicant had requested its bargaining unit to be described

expressly in terms which included: "all employees engaged in cement finishing". The Board noted that it had never recognized "employees engaged in cement finishing" as being a separate trade or classification for certification purposes even though the phrase had found its way into some collective agreements entered into by locals of the Labourers International Union. The clarity note is simply a way of acknowledging that, for certification purposes, the labourers union may from time to time represent employees whose work may be described as cement finishing. This is not the same situation in the instant application. Truck drivers and machine operators (operators of heavy construction equipment) are trades which the Board has recognized for certification purposes. The Board describes bargaining units in the construction industry in terms of those trades, among many others. As the Board noted in paragraph 12, if the respondent had been employing persons who spent the majority of their time on the date of application driving trucks or operating heavy construction equipment in sectors other than ICI, the Board would have found a unit described in terms of those trades to be appropriate pursuant to Practice Note #11.

14. It would appear that the parties' agreement that there should be a clarity note is based on the applicant's concern that construction labourers who intermittently drive trucks or operate heavy construction equipment may be treated by the respondent as not being employees in the bargaining unit when they perform that work. If during the life of the agreement there is a dispute on this issue, it is more appropriately dealt with by an arbitrator.

15. For the above reasons, we do not authorize an officer to make the enquiries the parties agreed to.

16. The Board further finds, pursuant to section 144(1) of the Act, that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

17. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on August 18, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

18. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in the *bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 2 of Board decision dated August 27, 1987 in respect of all construction labourers in the employ of the respondent in the industrial, commercial

and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

19. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

**1869-87-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant, v. Volcano Inc., Respondent**

**Certification - Construction Industry - Employer - Respondent involved principally in the manufacture, sale and installation of industrial boilers - Respondent entering into contract to install generating plant - Construction of building subcontracted but respondent moving mobile trailers to site for use as offices and storage - Trailers affixed to the land by labourers hired by the respondent - Board finding that the respondent is an employer who operates a business in the construction industry - Certificates issuing**

**BEFORE:** *R. A. Furness*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw*.

**APPEARANCES:** *David Strang* and *Raymond Doucette* for the applicant; *John Read* and *Richard Verdun* for the respondent.

**DECISION OF THE BOARD;** January 29, 1988

1. The name of the respondent is amended to read: "Volcano Inc."

2. The applicant has applied for certification under the construction industry provisions of the *Labour Relations Act* with respect to a bargaining unit of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors of the construction industry in the Board's geographic area 19, save and except non-working foremen and persons above the rank of non-working foreman. In its reply the respondent adopted the position that there was no unit of employees which was appropriate for collective bargaining and that there were no employees in the unit described by the applicant as of the date this application was made. This application was filed on October 7, 1987. In its reply the respondent raised a number of issues and the Board listed this application for hearing. The purpose of the hearing was to receive evidence and representations of the parties respecting all matters arising out of and incidental to the application, including in particular whether the respondent is a person who operates a business in the construction industry within the meaning of the *Labour Relations Act*.

3. At the hearing, the parties narrowed the areas and issues which were in dispute. The parties agreed, subject to the two issues subsequently referred to in this paragraph, that the bargaining unit described by the applicant was the appropriate bargaining unit for collective bargain-



ing and that the list of employees who would be included in the list of employees for the purpose of the count consisted of Wesley Proulx and Gary Thorkilson. The two issues which were outstanding were, firstly, whether or not the employees who were employed by the respondent were employed in construction work as of the date of the application and, secondly, whether the respondent operates a business in the construction industry under the provisions of sections 1(1)(f) and 117(c) of the *Labour Relations Act*.

4. The relevant facts in this application were not in dispute and were by agreement presented to the Board by both counsel and are now set forth. The respondent is involved principally in the manufacture, sale and installation of industrial boilers. In that capacity the respondent entered into an agreement with Northland Power in September of 1987. That agreement provides for the respondent to prepare all the design drawings and arrange for the necessary work in order to install a wood waste fire co-generating plant which is to be located in Cochrane, Ontario. As part of that agreement the respondent is responsible for all the work under the agreement. The principal part of the work would be the design and manufacture of systems and machines including the boilers for the wood waste plant. The design and manufacturing would be carried out at St. Hyacinthe, Quebec. As part of the work, the plant would consist of a building, the construction of which would in the normal course be subcontracted by the respondent. The respondent is not in the business of constructing buildings. In October of 1987, as a preliminary step to completing the work under the contract, the respondent engaged two subcontractors in the Cochrane area to complete certain work, principally the levelling of the site. As part of that process the respondent trucked to the site a mobile home and two mobile trailers. While the mobile home and trailers remain on wheels, there may be blocks underneath the mobile home for the purpose of levelling. The mobile home is to be used as an office and the two trailers are to be used for storage in the spring of 1988. Cladding has been placed around the mobile home and the two trailers. The mobile home has been attached to the two trailers. Earth has possibly been placed against the trailers to prevent the circulation of air under the trailers. Across and over the two trailers a portable metal roof has been placed. On the project site there was a driver and a welder employed by the respondent. Two subcontractors were involved in levelling, excavation and carpentry work. The carpentry contractor installed the floors in a shack between the two trailers. Mr. Proulx and Mr. Thorkilson worked on the site for approximately a week and were primarily engaged in assisting an operator/welder and the carpentry contractor. These two men were involved in setting up what is characterized by the applicant as a site warehouse and office trailer and assisted the operator/welder in placing the skirt around the two trailers. Once the skirt was in place and down to grade, the earth was mounded up by the labourers. Although the survey stakes were in place, the two men spent half a day placing other stakes which served as rough markings in order to delineate the job. The two men spent slightly more than half a day setting posts in concrete for a gate to the site. The two men were also involved in blocking the site trailer and placing a skirt around it. They also were involved in clean-up to get the warehouse ready. The two men were employees of the respondent and were paid by the respondent and were requested by the respondent and supplied out of the hiring hall of Local 491 of the Labourers' International Union of North America.

5. Counsel referred the Board to *Mattagami Lake Mines Limited (No Personal Liability)*, [1970] OLRB Rep. Feb. 1356, and to *Disney Display*, [1986] OLRB Rep. Feb. 236. The respondent argued that the issue was whether the two employees were employed during the period in question in the construction industry as defined in section 1(1)(f) and whether the work performed was such as to make the respondent an employer within the meaning of section 117(c) of the *Labour Relations Act*. The respondent pointed out that on the facts before the Board the utilities had not been connected as they had been in *Mattagami Lake Mines Limited (No Personal Liability)*, *supra*, and by analogy argued that as in *Disney Display*, the home and trailers remained chattels in that they had not become attached to the ground. The respondent also pointed out the

differences between fixtures which are annexed to the realty and chattels which are not annexed to the realty and argued that the home and the trailers were chattels when they were brought to the site and were not subsequently annexed to the land. The respondent argued that since the home and trailers were not annexed to the land they could be moved without difficulty. Accordingly, these two employees could not have been employed in construction work as of the date of the filing of this application. With respect to the second issue under section 117(c) of the *Labour Relations Act*, the respondent reasoned that, with respect to the period in question, even though it was a party to a contract to construct a building, it was not involved in construction work and therefore was not operating a business in the construction industry within the meaning of section 117(c) of the *Labour Relations Act*. The respondent informed the Board that it relied on the first ground more than it relied on the second ground.

6. The applicant argued that the surrounding of dirt around the skirt made the mobile home and trailers fixtures and that the temporary nature of the fixtures did not alter the fact that the mobile home and trailers had become part of the realty. The mobile home and trailers could not be moved around and constituted the construction of an office and a warehouse. The applicant reasoned that the purpose of the structure being placed on the site is part of the construction of a power plant and that it was unquestionably construction in that it involved the moving, storage and set up of materials on site as opposed to the mere delivery. The applicant argued that the labourers assisted the tradesmen who performed the work and that without doubt the setting up of the gate posts involved the pouring of concrete and that the placing of stakes involved the pounding of those stakes. These functions, together with the work involved in blocking the warehouse, are very much traditional functions performed by labourers in construction work on construction sites. The applicant referred to the decision of the Board in File No. 1961-87-R (decision dated January 7, 1988), where the Board had found that the respondent operated a business in the construction industry. It was the position of the applicant that, even though the question of utilities had not been addressed in the agreed facts, utilities would have to be installed before the office and warehouse were operational. The applicant made a distinction between display cases at the Canadian National Exhibition in *Disney Display*, *supra*, and the facts in the present application. The applicant characterized the respondent as being in the business of constructing a power plant and argued that the respondent could not seriously suggest that it was not operating a business in the construction industry.

7. Sections 1(1)(f), 117(c) and 119(1) of the *Labour Relations Act* provide as follows:

1.-(1) In this Act,

• • •

- (f) “construction industry” means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof.

117. In this section and in sections 118 to 136,

• • •

- (c) “employer” means a person who operates a business in the construction industry, and for purposes of an application for accreditation means an employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof.

119.-(1) Where a trade union applies for certification as bargaining agent of the employees of an employer, the Board shall determine the unit of employees that is appropriate for collective bargaining by reference to a geographic area and it shall not confine the unit to a particular project.

The Board notes that no issue arises in this application with respect to whether the employees who are affected by this application are employees within the meaning of section 117(b) which provides as follows:

117(b) "employee" includes an employee engaged in whole or in part in off-site work but who is commonly associated in his work or bargaining with on-site employees.

The Board further notes that no issue arises with respect to the status of the applicant with reference to the provisions of section 117(f) which provides as follows:

117(f) "trade union" means a trade union that according to established trade union practice pertains to the construction industry.

In the declaration which accompanied Form 75, Application for Certification, Construction Industry, the applicant has declared that it is a council of trade unions that according to established trade union practice pertains to the construction industry.

8. The facts in the instant application are similar to the facts in *Mattagami Lake Mines Limited (No Personal Liability)*, *supra*, in that in both cases an employer has moved mobile trailers to a remote site for use as an adjunct to its business operations. The facts in *Disney Display*, *supra*, are not at all similar and the Board notes that the temporary erection of display units which were not intended to be attached to the realty in no way parallels the fact of the instant application. In *Disney Display*, *supra*, the Board concluded that an employer engaged in such work was not an employer in the "construction industry".

9. In the instant application the respondent has used the two labourers to perform a variety of tasks. They assisted an operator/welder and the carpentry contractor. In addition, they were involved in the setting up of a site warehouse and office trailer. They assisted the operator/welder in placing the skirt around the two trailers. Other tasks that they were involved in consisted of setting posts in concrete for a gate to the site and the blocking of the site trailer.

10. Although the agreed facts do not refer to the connection of utilities to the three units, there can be no doubt that the terms "office" and "warehouse" denote that personnel will be working within these units from time to time. There was no mention in the agreed facts as to the duration of the use of these three units. It therefore appears to the Board that these three units are to be utilized for an indefinite period. The setting of a unit on blocks, the construction of a skirt around the base of the units and the mounding up of earth collectively produce a considerable degree of affixture of these units to the land. In their present state these units are not readily movable and have been affixed to the land. In *Arcan Eastern Ltd.*, [1969] OLRB Rep. Apr. 141, the Board held that where pallet racking had been attached to a building it was to be considered as part of the building and that its installation came within the meaning of the words "engaged in constructing...buildings" in section 1(1)(f) of the *Labour Relations Act*. In *The Corporation of the City of Toronto*, [1978] OLRB Rep. Dec. 1145, the Board held that where an article was affixed to the land, even slightly, such article was to be considered as part of the land and work in connection with such an article would fall within the definition of construction industry.

11. In the instant application the Board finds that these three units have been affixed to the land and that the work involved in affixing them to the land is work which falls within the meaning of "construction industry" in section 1(1)(f). The Board notes that the two labourers were engaged



in aspects of this work and were accordingly engaged in performing work in the construction industry. In our view, the work of setting posts in concrete for a gate to the site and the blocking of the site trailer also is work which falls within the meaning of section 1(1)(f) and the Board so finds. The work in which the respondent was engaged in its employment of the two labourers came within the meaning of the words "engaged in constructing...buildings" in section 1(1)(f).

12. Does the activity of the respondent in the facts of this application constitute the operation of a business in the construction industry within the meaning of section 117(c) of the *Labour Relations Act*? In *Mattagami Lake Mines Limited (No Personal Liability)*, *supra*, the Board stated at page 1357:

It is also the respondent's contention that it is not operating the business in the construction industry and that, in any event, it is not the intention of the respondent to be in the business of doing construction work in the future. There is no reason why the respondent may not subsequently change its policy or corporate mind and again engage in construction work. Whether the respondent does or does not undertake construction work in the future is a matter of speculation. This application therefore, must be dealt with on the basis that the respondent, a corporation involved in the pursuit of finding, developing and operating mines, is engaged for the first time in constructing a structure for housing employees in connection therewith.

The Board has dealt with substantially similar situations in the *Tops Marina Motor Hotel* case, 64 CLLC ¶16,004, OLRB Monthly Reports January 1964 p. 583, and in the *Canada Niagara Falls Limited* case, OLRB Monthly Reports, April 1966, p. 44. The arguments raised by counsel for the respondent are similar to those considered by the Board in the two cases cited above and the Board sees no reason to depart from the principles established therein. The Board therefore further finds that the respondent is an employer operating a business in the construction industry within the meaning of sections 117(c) and 1(1)(f) of The Labour Relations Act. Having regard, therefore, to all the above considerations, the Board further finds that this is an application falling within section 119 of The Labour Relations Act.

This reasoning applies equally in the circumstances of this application and the Board finds that the respondent is an employer who operates a business in the construction industry within the meaning of section 117(c).

13. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on September 30, 1983, the designated employee bargaining agency is The Labourers' International Union of North America and The Labourers' International Union of North America, Ontario Provincial District Council.

14. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for

such geographic area have already been acquired under subsection 3 or by voluntary recognition.

15. The Board further finds, pursuant to section 144(1) of the Act, that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

16. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on October 26, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

17. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 13 above in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

18. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of the respondent within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

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**2524-87-R** Ontario Secondary School Teachers' Federation, Applicant v. **The Board of Education for the City of Windsor**, Respondent v. United Brotherhood of Carpenters & Joiners of America Local 494, Intervener #1 v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552, Intervener #2 v. Canadian Union of Public Employees, Intervener #3

**Bargaining Unit - Certification - Trade union and employer agreeing on unit defined by reference to a small number of particular job classifications - Board still required to determine appropriate unit - Problem in determining boundary between this and other groups - Board accepting agreement - Certificates issuing**

**BEFORE:** *Owen V. Gray*, Vice-Chair, and Board Members *D. A. MacDonald* and *H. Peacock*.

**APPEARANCES:** *Maurice A. Green*, *Mary Jean Gallagher*, *Fred Birket* and *Joan Farrell* for the applicant; *Brian P. Nolan*, *Zolle Veres* and *V. Bill Pilotis* for the respondent; no one appearing for any of the interveners.

**DECISION OF THE BOARD;** January 25, 1988

1. This is an application for certification. The title of this proceeding is amended to name the respondent as "The Board of Education for the City of Windsor."

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* ("the Act").

3. The parties agree that

all employees of the Respondent employed as Speech Pathologists, Psychologists, Psychometrists, Social Worker/Attendance Councillors save and except the Superintendent of Special Education and Special Services and those above the rank of Superintendent and employees in bargaining units for whom any trade union held bargaining rights as of the date of certification

constitute a unit of employees of the respondent appropriate for collect bargaining, it being understood that "employee" means employee within the meaning of the Act and excludes persons deemed not to be employees by clause 1(3)(b) of the Act.

4. Subsection 6(1) of the *Labour Relations Act* provides that "...upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining...". The agreement of an applicant trade union and respondent employer does not relieve the Board of its obligation to determine the appropriate bargaining unit.

5. The principles and policies applied by the Board in determining appropriate bargaining units have been articulated in any number of decisions of the Board. In *Canadian General Electric Company Limited*, [1979] OLRB Rep. March 169, for example, the Board made these general observations in paragraph 6:

6. The Board's primary concern in evaluating the appropriateness of a suggested bargaining unit is that the unit represent a viable collective bargaining entity. In assessing the suitability of a



proposed unit the Board is generally guided by two counter-balancing concerns. Firstly, having regard to the proposed unit itself, the Board looks to whether the employees involved share a sufficient community of interest to constitute a cohesive group which will be able to bargain effectively together. Secondly, looking to the employer's operation as a whole, the Board assesses whether the proposed unit is sufficiently broad to avoid excessive fragmentation of the collective bargaining framework. A proliferation of bargaining units is not normally conducive to collective bargaining stability. Not only may it place significant strains on an employer who would be required to bargain with each group, but also it may hamper the employees ability to bargain effectively with the employer. Under the umbrella of these two guiding principles, the Board seeks to give effect to an equally important concern: the freedom of association guaranteed to employees in section 3 of the Act. As with all freedoms, the principle of freedom of association is not unbridled and must be blended with the Board's responsibility to establish an effective collective bargaining structure. The Board seeks to balance its respect for an employee's right to associate freely on the one hand with its responsibility to establish a durable collective bargaining entity on the other by requiring that a proposed bargaining unit be the unit appropriate for collective bargaining but not going so far as to insist that it be the most appropriate unit (see *Perennial Foods Limited*, [1969] OLRB Rep. April 38; *The Board of Education for the City of Toronto*, [1970] OLRB Rep. July 430; *Wellesley Hospital*, [1974] OLRB Rep. Jan. 55 and *Livingston Transportation Limited*, [1975] OLRB Rep. July 568).

6. Here, the applicant and respondent have proposed that the bargaining unit be defined by reference to a small number of particular job classifications. A proposal of that sort generally raises concerns to which reference was made in paragraphs 8 and 9 of the Board's decision in *Canadian General Electric Company Limited*, *supra*:

8. As a general principle bargaining units limited to a particular department or a particular classification are not considered appropriate by the Board (see *The Corporation of The City of Berry*, [1974] OLRB Rep. Nov. 813). There are innumerable cases where because of its aversion to fragmentation the Board has refused to recognize as appropriate a unit containing only a small segment of employees within an employer's overall operation. In the *Board of Health of the York-Oshawa District Health Unit*, [1969] OLRB Rep. June 340, for example, the Board stated that it would not fragment the respondent's technical employees because "to do so would create a collective bargaining situation where the respondent would be required to deal separately with clerical employees, public health inspectors, registered nursing assistants and dental hygienists." (p.341). In *Waterloo County Health Unit*, [1969] OLRB Rep. Jan. 1016 the Board refused to certify the applicant for a unit composed of public health inspectors when there were other persons including dental hygienists in the health unit. Similarly, in *McMaster University*, [1973] OLRB Rep. Feb. 102, the Board refused to allow the applicant to carve out from the University all non-professional library employees and indicated that the appropriate unit would be all clerical, technical and office employees of the university. As well, in *The Regional Municipality of York*, [1971] OLRB Rep. June 316 the Board denied the applicant's proposed bargaining unit of employees in the survey section of the engineering department when there were six additional branches of the engineering department (see also *The Corporation of the Township of Markham*, [1969] OLRB Rep. Aug. 592 and *The Board of Education for the Borough of North York*, [1970] OLRB Rep. Dec. 915). In cases where the Board has certified a segregated group of employees it has generally been satisfied that the segment in question constituted a recognizable, cohesive group functioning as an independent entity. (see *Ex-Cell-O Corporation of Canada, Limited*, [1974] OLRB Rep. Aug. 543; *The Governors of the University of Toronto*, [1969] OLRB Rep. Feb. 1149, and *University of Western Ontario*, [1972] OLRB Rep. Dec. 1038).

9. The exercise of highly specialized skills by employees in a proposed bargaining unit, moreover, does not by itself establish that those employees form an appropriate bargaining unit. In *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459, for example, the Board refused to recognize as appropriate a unit encompassing paramedicals employed in a professional capacity and declared instead that the unit appropriate for collective bargaining was one that would include paramedicals employed in both a technical and professional capacity thereby bringing together in one unit occupations such as psychologists, social workers, pharmacists, physiotherapists, radiological technicians and respiratory technologists. The Board was of the view that these two groups did not function independently of one another in that all the occupations in question were integrally related to the medical treatment process. The Board concluded that the

group shared a functional interdependence because the paramedicals employed in a professional capacity regularly relied on information and analysis provided by the other paramedical occupations. To break the group along a technical/professional line would have, in the Board's view, caused undue fragmentation in the hospital.

7. While the agreement of an applicant trade union and respondent employer to a particular bargaining unit configuration does not relieve the Board of its obligation to determine whether that configuration is appropriate for collective bargaining, the existence of such an agreement is a significant consideration in making that determination if, as is generally the case, it reflects a balancing of the aforementioned considerations by the parties in light of their special and shared knowledge of the employer's organization and of the industry in which that employer functions.

8. School boards are obliged by law to employ one or more school attendance counsellors. A number of school boards also employ social workers, psychologists and other sorts of counsellors, therapists and consultants to provide special services to students and teachers. Groupings of similar employees of other school boards have been separately organised and represented for collective bargaining purposes as a result of certification or voluntary recognition by a variety of trade unions. This suggests that such employees share a stronger community of interest with one another than with custodians, secretarial and clerical employees and other groupings which have been the subject of certification and voluntary recognition in school board collective bargaining. It also reflects a greater degree of tolerance of fragmentation or potential fragmentation on the part of those school boards than might be expected in other sectors. The Board is not aware of any situation in which the separate representation of such groups has created any viability problem in school board collective bargaining. While a school board's tolerance for balkanized collective bargaining structures will have its limits (see *The Board of Education for the City of Toronto*, [1986] OLRB Rep. June 900), the school board respondent in this application has not expressed that concern.

9. Once one accepts the general proposition that these sorts of support personnel can form a viable bargaining unit distinct from building services and office and clerical personnel, there is then the challenge of finding the sensible boundary between this and those other groups, and also the challenge of so defining that boundary as to ensure that employees subsequently hired to perform skills and provide services other than those performed and provided by present employees are allocated in a sensible way by that boundary definition. The latter challenge is better met by a bargaining unit description which depends on a generic description of the distinguishing characteristic or characteristics of the job classifications which are to fall within it, rather than on a simple listing of job classifications. Unfortunately, it can be difficult to design a workable definition capable of universal application, as the Board's experience in the hospital sector amply demonstrates.

10. We raised these concerns with the applicant and respondent at the hearing of this matter. They indicated an awareness of the potential for difficulty which is created by defining this unit by reference to particular job classifications. They expressed their belief that the classifications adopted in their proposed bargaining unit description took potential future developments into account and provided adequate stability in that regard. Having regard to those representations and the constraints of the respondent's existing collective bargaining relationships, we are prepared to and do find that the bargaining unit on which the parties have agreed and their description of it are appropriate for collective bargaining for the purpose of this application. We express the hope that the parties to other applications affecting similar sorts of employees will consider these matters and, to the extent existing bargaining structures there allow, attempt to devise a bargaining unit description which is less dependent on the simple listing of job classifications.

11. The parties disagree about whether the respondent's Head Psychologist and Head Social Worker/Attendance Counsellor are "managerial" - that is, whether functions they exercise

are such as to result in their exclusion from any bargaining unit by operation of clause 1(3)(b) of the Act. This dispute was initially articulated as a dispute over bargaining unit description: whether those job titles should appear among the express exclusions in the description of the unit. Both parties acknowledged, however, that the concern that "first line managerial employees" be excluded from the unit can be adequately addressed in the description of the unit by

- a) expressly excluding those at and above the lowest position which the parties agree is managerial, and
- b) noting that the phrase "all employees" necessarily excludes anyone else who may now or hereafter fall within the scope of clause 1(3)(b) of the Act.

This approach has certain advantages, particularly where, as here, the inclusion in or exclusion from the bargaining unit of persons in the disputed positions as of the application date cannot materially affect the applicant's percentage of membership as of the relevant date: see *Robin Hood Multifoods Inc.*, [1985] OLRB Rep. July 1159. As appears from paragraph 3 of this decision, the parties agreed to that approach.

12. We are satisfied on the basis of all the evidence before us that more than fifty-five per cent of those employed by the respondent in the bargaining unit on the date of application were members of the applicant on December 23, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

13. A certificate will issue to the applicant with respect to

all employees of the respondent employed as Speech Pathologists, Psychologists, Psychometrists, Social Worker/Attendance Councillors, save and except the Superintendent of Special Education and Special Services and those above the rank of Superintendent and employees in bargaining units for whom any trade union held bargaining rights as of January 8, 1988.

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**2451-87-R** Ontario Secondary School Teachers' Federation, Applicant v. The Board of Education for the City of York, Respondent v. Association of Professional Student Services Personnel, Intervener #1 v. The Canadian Union of Public Employees, Intervener #2

**Bargaining Unit - Certification - Trade Union - Incumbent union asserting that applicant could not be certified because the constitution and by-laws of the applicant did not allow these employees to become members of that trade union - Applicant having established practice of admitting such persons to membership without regard to eligibility requirements - Unnecessary for Board to determine whether applicant could otherwise be denied certification - Vote ordered**

**BEFORE:** Owen V. Gray, Vice-Chair, and Board Members D. A. MacDonald and H. Peacock.

**APPEARANCES:** Maurice A. Green, Fred Birket, Joan Farrell, and Mark Dooner for the applicant;



Steven L. Moate, Norman Ahmet, Barry Rowland and Ben Lindberg for the respondent; C. M. Dassios, Ann Mills, Mal Godin, Mike Tapa, Ann Pepper and David Warren for intervenor #1; no one appearing for intervenor #2.

# **DECISION OF THE BOARD; January 25, 1988**

1. In this proceeding, the Ontario Secondary School Teachers' Federation ("OSSTF") seeks certification under the Labour Relations Act ("the Act") as exclusive bargaining agent for a unit of employees of the respondent school board currently represented by the Association of Professional Student Services Personnel ("APSSP").

2. OSSTF has been found to be a trade union within the meaning of clause 1(1)(p) of the Act in previous proceedings under the Act. None of the parties to this application challenges the proposition that the applicant is a trade union. Accordingly, having regard to section 105 of the Act, we find that the applicant is a trade union within the meaning of clause 1(1)(p) of the Act.

3. The unit currently represented by the APSSP consists of

all psychologists, psycho-educational consultants, social workers and attendance counsellors employed by the respondent in the City of York, save and except senior psychologists, senior social workers, persons above the rank of senior psychologists and senior social workers and persons regularly employed for not more than 24 hours per week.

The parties in attendance at the Board's hearing of this application all agreed that that constitutes the unit of employees of the respondent appropriate for collective bargaining for the purpose of this application, and we so find.

4. The APSSP asserted that OSSTF could not or should not be certified as exclusive bargaining agent for employees in the bargaining unit because, it alleged, the constitution and by-laws of OSSTF do not allow such persons to become members of that trade union.

5. OSSTF is a non-profit corporation under the *Ontario Corporations Act*. By Supplementary Letters Patent issued on May 15, 1987, the Letters Patent of OSSTF were amended to include the following paragraph in its objects:

(a) to associate and unite the Secondary School Teachers and other professional employees of educational institutions offering secondary school credits in the Province of Ontario and to promote and safeguard their interests.

The provisions of the By-laws of the OSSTF have not since changed. They still provide for membership of two sorts of persons: statutory members, who are teachers (within the meaning of the *Teaching Profession Act*) who are employed to teach in a secondary school under the form of contract contemplated by section 230 of the *Education Act*, and non-statutory members "who shall be employed in an educational capacity by a Board of Education or Educational Institution offering secondary school credits in Ontario." (See the *Oxford County Board of Education*, [1985] OLRB Rep. Sept. 1409 at paragraph 4.) Counsel for OSSTF proposed to introduce evidence and argument that:

(a) the amendment to its Letters Patent permitted the executive of OSSTF to admit "professional employees of education institutions" into membership even if they are neither secondary school teachers and nor persons "employed in an education capacity";

- (b) the employees affected by this application are “employed in an educational capacity by a Board of Education”; and,
- (c) in any event, the OSSTF has an established practice of admitting such persons to membership without regard to the eligibility requirements of its Letters Patent or By-laws.

With respect to the last point, counsel for OSSTF asserted that, apart from the employees affected by this and other similar applications heard on the same day, the OSSTF had earlier organized similar employees of another board of education and taken such employees into membership and, after filing a certification application, had been granted voluntary recognition as exclusive bargaining agent for those employees by that school board. Counsel for the APSSP and for the respondent both agreed that we could take these assertions as fact without more formal proof. Counsel for the APSSP acknowledged, and counsel for the respondent did not dispute, that those facts revealed a practice of the sort referred to in subsection 103(4) of the Act and constituted an effective answer to the issue raised by the intervener. In those circumstances, it was unnecessary for us to consider whether, as counsel for the APSSP asserted (relying on earlier decisions of this Board), a trade union may be denied either outright certification or the opportunity of a representation vote notwithstanding its timely filing of written evidence that the requisite percentage of those employed in the appropriate bargaining unit on the application date had, by the date contemplated by subsection 7(1) of the Act, each “applied for membership in the trade union and ... paid to the trade union on his own behalf an amount of at least \$1.00 in respect of initiation fees or monthly dues that the trade union” (see clause 1(1)(l) of the Act).

6. We are satisfied on the basis of all of the evidence before us that more than fifty-five per cent of the persons employed by the respondent in the bargaining unit at the time this application was made were members of the applicant on December 21, 1987, the terminal date fixed for this application and the date which we determine, under section 103(2)(j) of the Act, to be the time for the purpose of ascertaining membership under subsection 7(1) of the Act. As certification of the applicant would terminate the existing bargaining rights of another trade union, we exercise our discretion under subsection 7(2) of the Act by directing that a representation vote be conducted among employees in the bargaining unit (see *Famz Foods Limited*, [1984] OLRB Rep. Dec. 1714 and the cases cited in paragraph 4 thereof).

7. All those employed in the bargaining unit on January 8, 1988 who are so employed on the date the vote is conducted will be eligible to vote.

8. Voters will be asked whether they wish to be represented by the applicant or intervener #1 in their employment relations with the respondent.

9. The matter is referred to the Registrar.

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# APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING DECEMBER 1987

## APPLICATIONS FOR CERTIFICATION

### Bargaining Agents Certified Without Vote

**0507-85-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Harnden & King Construction Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent working at and out of the Dale Road pit and asphalt plant, in Hamilton Township, Northumberland County, save and except scale man, non-working foremen and those above the rank of non-working foreman" (14 employees in unit) (*Having regard to the agreement of the parties*)

**0508-85-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Harnden & King Construction Ltd (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent working at and out of Alyea Pit, Murray Township Northumbership County save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit) (*Clarity Note*)

**0509-85-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Harnden & King Construction Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent working at and out of the heavy equipment and motor vehicle repair shops at 75 White Street East, Cobourg, Ontario, save and except non-working foremen, engineering, sales, office and clerical staff, and security guards" (24 employees in unit) (*Having regard to the agreement of the parties*)

**0510-85-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Harnden & King Construction Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and all truck drivers and construction labourers in the employ of the respondent in the Towns of Cobourg and Port Hope and the geographic Townships of Hope, Hamilton, and Alnwick in the County of Northumberland, in all sectors of the construction industry excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (24 employees in unit)

**0560-85-R:** International Union of Operating Engineers, Local 793 (Applicant) v. MIHU Holdings Limited, and Mancheneel Investments Limited, c.o.b. as H & D Construction (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**0841-85-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Harnden & King Construction Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent working at and out of pit #60 in the Township of Hope in the County of Northumberland, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit) (*Having regard to the agreement of the parties*)

**0542-86-R:** United Food & Commercial Workers Union, Local 206 (Applicant) v. Knob Hill Farms Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Oshawa, save and except Assistant Store Manager, persons above the rank of Assistant Store Manager and office staff" (217 employees in unit) (*Having regard to the agreement of the parties*)

**2848-86-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Unicell Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff" (76 employees in unit) (*Having regard to the agreement of the parties*)

**3553-86-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Kuna Custom Builders (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

**0150-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. H & T Carpentry (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

**0345-87-R:** Labourers' International Union of North America, Local 506 (Applicant) v. Ming Sun Holdings Inc. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

**0993-87-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Lakh Construction Corporation, and Jay Hardware Ltd. (Respondents)

Unit: "all construction labourers in the employ of the respondents in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the

employ of the respondents in all other sectors within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

**1054-87-R:** International Brotherhood of Electrical Workers, Local 894 (Applicant) v. County Electric of Peterborough Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices in the employ of the respondent in all other sectors in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

**1105-87-R:** Ontario Public Service Employees' Union (Applicant) v. Prescott-Russell Children's Aid Society (Respondent)

Unit: "all employees of the respondent in the Counties of Prescott and Russell, save and except supervisors, persons above the rank of supervisor, secretary to the executive director, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (24 employees in unit) (*Clarity Note*)

**1250-87-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Ottawa Greenbelt Construction Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit) (*Having regard to the agreement of the parties*)

**1679-87-R:** International Brotherhood of Painters & Allied Trades, Local 557 (Applicant) v. Corporation of the City of Toronto (Respondent) v. Metropolitan Toronto Civic Employees Union, Local 43, C.U.P.E. (Intervener #1) v. Canadian Union of Public Employees, Local 79 (Intervener #2)

Unit: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of the respondent in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman and employees for whom the Metropolitan Toronto Civic Employees Union, Local 43, Canadian Union of Public Employees, and Canadian Union of Public Employees, Local 79, held bargaining rights as of September 18, 1987, as more particularly described in their collective agreements in effect from January 1, 1987 to December 31, 1988" (22 employees in unit) (*Having regard to the agreement of the parties*)

**1691-87-R:** International Brotherhood of Painters & Allied Trades, Local 1819 (Applicant) v. Corporation of the City of Toronto (Respondent) v. Metropolitan Toronto Civic Employees Union, Local 43, C.U.P.E. (Intervener #1) v. Canadian Union of Public Employees, Local 79 (Intervener #2)

Unit: "all glaziers and glaziers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all glaziers and glaziers' apprentices in the employ of the respondent in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working



foremen and persons above the rank of non-working foreman, and employees in bargaining units for whom the Metropolitan Toronto Civic Employees Union, Local 43, Canadian Union of Public Employees, and Canadian Union of Public Employees, Local 79, held bargaining rights as of September 21, 1987, as more particularly described in their collective agreements in effect from January 1, 1987 to December 31, 1988" (2 employees in unit) (*Having regard to the agreement of the parties*)

**1696-87-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Tisket Investments Ltd., Tasket Investments Ltd., and 661138 Ontario Ltd., c.o.b. as Terra Gold Homes (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondents in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

**1705-87-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Ellis-Don Limited (Respondent)

Unit: "all construction labourers in the employ of the respondent in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers), and the provisional County of Haliburton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

**1723-87-R:** Canadian Brotherhood of Railway, Transport & General Workers (Applicant) v. Travelways Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Cornwall, save and except foreperson, persons above the rank of foreperson, office, clerical and sales staff and maintenance and garage staff" (75 employees in unit) (*Having regard to the agreement of the parties*)

**1731-87-R:** International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Strap Drywall & Acoustic Systems Ltd., and Strap Contracting Limited (Respondents)

Unit: "all painters and painters' apprentices in the employ of the respondent Strap Drywall & Acoustic Systems Ltd., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of the respondent, Strap Drywall & Acoustic Systems Ltd., in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

**1732-87-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Voplex-Happich Corporation (Respondent)

Unit: "all employees of the respondent in the City of Woodstock, save and except supervisors, persons above the rank of supervisor, office and sales staff, and students employed during the school vacation period" (82 employees in unit) (*Having regard to the agreement of the parties*)

**1776-87-R:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Ambertex Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Brantford, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (23 employees in unit)

**1782-87-R:** United Steelworkers of America (Applicant) v. Corporation of the Township of Michipicoten (Respondent) v. William A. Lamon (Objector)

Unit: “all employees of the respondent in the Township of Michipicoten, save and except foremen, persons above the rank of foreman, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (4 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**1803-87-R:** Canadian Union of Public Employees (Applicant) v. La Salle Ambulance Services (Respondent)

Unit: “all employees of the respondent in Belleville, save and except supervisors and persons above the rank of supervisor” (12 employees in unit) (*Having regard to the agreement of the parties*)

**1864-87-R:** United Steelworkers of America (Applicant) v. Gelderland Limited (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of forepersons, office and sales staff, and students employed during the school vacation period” (27 employees in unit) (*Having regard to the agreement of the parties*)

**1881-87-R:** Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Applicant) v. M & K Plastic Products Limited (Respondent)

Unit: “all employees of the respondent in the City of Brampton, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (39 employees in unit) (*Having regard to the agreement of the parties*)

**1882-87-R:** Ontario Nurses’ Association (Applicant) v. Corporation of the County of Lennox & Addington (Respondent)

Unit #1: “all registered and graduate nurses employed in a nursing capacity by the respondent at Lenadco Home for the Aged, in the Township of Richmond, save and except Directors of Nursing, persons above the rank of Director of Nursing and persons regularly employed for not more than 24 hours per week” (4 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all registered and graduate nurses employed in a nursing capacity by the respondent at Lenadco Home for the Aged in the Township of Richmond, regularly employed for not more than 24 hours per week, save and except Director of Nursing, and persons above the rank of Director of Nursing” (5 employees in unit) (*Having regard to the agreement of the parties*)

**1889-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Vista Construction of Canada Ltd. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

**1922-87-R:** Retail, Wholesale & Department Store Union (Applicant) v. Canadian Corporate Management Co. Ltd. (Respondent)

Unit: “all employees of the respondent at its Cashway Building Centers Division in the City of Niagara Falls, save and except supervisors, persons above the rank of supervisor, office, clerical and outside sales staff” (14 employees in unit) (*Having regard to the agreement of the parties*)

**1945-87-R:** Canadian Union of Public Employees (Applicant) v. Ferncliff Daycare & After School Group (Respondent)

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, bookkeeper, and persons regularly employed for not more than 24 hours per week" (11 employees in unit)

**2081-87-R:** Canadian Paperworkers Union (Applicant) v. Karl Gutmann Incorporated (Respondent) v. Group of Employees (Objectors)

Unit: "all office and clerical employees of the respondent in Cornwall, save and except supervisors, persons above the rank of supervisor, sales staff, and employees in bargaining units for which any trade union held bargaining rights as of October 28, 1987" (4 employees in unit) (*Having regard to the agreement of the parties*)

**2095-87-R:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Hully Gully (London) Ltd. (Respondent)

Unit: "all employees of the respondent in the Township of Westminster, save and except department managers, persons above the rank of department manager, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (14 employees in unit) (*Having regard to the agreement of the parties*)

**2131-87-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Guthrie Canadian Investments Ltd. (Respondent)

Unit: "all employees of the respondent at its Butler Polymet Division in Guelph, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (8 employees in unit) (*Having regard to the agreement of the parties*)

**2149-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 1988 (Applicant) v. 667327 Ontario Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

**2150-87-R:** Energy & Chemical Workers Union (Applicant) v. Canadian Plastics Concentrates Ltd. (Respondent)

Unit: "all employees of the respondent in the Town of Petrolia, save and except supervisors, persons above the rank of supervisor, office and sales staff, and students employed during the school vacation period" (32 employees in unit) (*Having regard to the agreement of the parties*)

**2156-87-R:** Ontario Nurses' Association (Applicant) v. Dr. Elizabeth Bagshaw Planned Parenthood Centre (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent in the City of Hamilton, save and except the Clinic Director and persons above the rank of Clinic Director" (5 employees in unit) (*Having regard to the agreement of the parties*)

**2160-87-R:** United Steelworkers of America (Applicant) v. Service Employees Union, Local 183 (Respondent)

Unit: "all office and clerical employees of the respondent in the City of Belleville, save and except supervisors



and those persons above the rank of supervisor” (2 employees in unit) (*Having regard to the agreement of the parties*)

**2161-87-R:** United Steelworkers of America (Applicant) v. Service Employees Union, Local 183 (Respondent)

Unit: “all employees of the respondent in the City of Belleville, save and except supervisors, persons above the rank of supervisor and office and clerical employees” (3 employees in unit) (*Having regard to the agreement of the parties*)

**2194-87-R:** Graphic Communications International Union, Local 500M (Applicant) v. McLaren Morris & Todd Ltd. (Respondent)

Unit: “all employees of the respondent in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and persons for whom any trade union held bargaining rights as of November 6, 1987” (66 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**2210-87-R:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Bieler Plumbing & Heating Ltd., Apollo Mechanical Contractors Division (Respondent)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (11 employees in unit)

**2213-87-R:** Canadian Union of Public Employees, Local 1785 (Applicant) v. Corporation of the Township of Scugog (Respondent)

Unit: “all office and clerical employees of the respondent in the Township of Scugog, save and except the Assistant to the Clerk-Administrator, persons above the rank of Assistant to the Clerk-Administrator, Roads Superintendent, Chief Building Official and Treasurer” (11 employees in unit) (*Having regard to the agreement of the parties*)

**2227-87-R:** Ontario Nurses’ Association (Applicant) v. Trillium Home for the Aged (L.O.B.A. Ontario West Inc.) (Respondent)

Unit: “all registered and graduate nurses employed in a nursing capacity by the respondent in the City of Orillia, save and except the Director of Nursing and persons above the rank of Director of Nursing” (8 employees in unit) (*Having regard to the agreement of the parties*)

**2230-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. The Labour Council Development Foundation (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

**2232-87-R:** International Union of Operating Engineers, Local 793 (Applicant) v. 657572 Ontario Inc., c.o.b. as Double S Construction (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all other employees of the respondent in all other sectors in that portion of the District of Algoma south of the 49th parallel of latitude, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

**2234-87-R:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Colonial Furniture (Ottawa) Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, buyers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (14 employees in unit)

**2237-87-R:** Energy & Chemical Workers Union (Applicant) v. Drummond Business Forms (1984) Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Brockville, save and except foremen, persons above the rank of foreman, office and clerical staff and students employed during the school vacation period" (49 employees in unit) (*Having regard to the agreement of the parties*)

**2254-87-R:** Graphic Communications International Union, Local 500M (Applicant) v. Adpak International Ltd. (Respondent)

Unit: "all employees of the respondent in its Carton Division in Brampton, save and except office and sales staff, supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and persons in bargaining units for which any trade union held bargaining rights as of November 12, 1987" (33 employees in unit) (*Having regard to the agreement of the parties*)

**2261-87-R:** International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Northend Interiors Ltd. (Respondent)

Unit: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (14 employees in unit)

**2263-87-R:** International Association of Machinists & Aerospace Workers (Applicant) v. Autofix Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Sault Ste. Marie, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (4 employees in unit) (*Having regard to the agreement of the parties*)

**2264-87-R:** International Brotherhood of Electrical Workers, Local 115 (Applicant) v. UTDC Inc. (Respondent) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), Local 1837 (Intervener)

Unit: "all employees of the respondent at Napanee, Ontario save and except foremen, persons above the rank of foreman, office and clerical staff and students employed during the school vacation period" (11 employees in unit) (*Having regard to the agreement of the parties*)

**2280-87-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Bruno's Contracting (Thunder Bay) Ltd. (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, all employees engaged in survey work and all construction labourers and truck drivers in the employ of the respondent in the District of Rainy River, excluding the industrial, commercial and institutional sector, save and except party chief, non-working foremen and persons above the ranks of party chief and non-working foreman" (24 employees in unit)

**2290-87-R:** Teamsters Local 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Chipperfield Trucking Services Ltd. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (24 employees in unit) (*Having regard to the agreement of the parties*)

**2384-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Interior Wood Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

**2385-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Pannonia Woodworking Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

**2428-87-R:** International Brotherhood of Painters & Allied Trades, Local 205 (Applicant) v. Spree Painting Contractors Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Waterloo, the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Township of Nassagaweya, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

**2470-87-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Malnic Contracting Inc. (Respondent)

Unit: "all employees of the respondent engaged in concrete forming construction on residential building projects in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (15 employees in unit)



### Bargaining Agents Certified Subsequent to Pre-Hearing Vote

**0853-87-R:** Ontario Secondary School Teachers' Federation (Applicant) v. The Peel Board of Education (Respondent)

Unit: "all occasional teachers in the employ of the respondent in its secondary panel in the Regional Municipality of Peel" (283 employees in unit)

Number of names of persons on revised voters' list		283
Number of persons who cast ballots	69	
Number of ballots marked in favour of applicant		47
Number of ballots marked against applicant		9
Ballots segregated and not counted		13

**1473-87-R:** International Woodworkers of America (Applicant) v. United Sawmill Ltd. (Respondent)

Unit: "all employees of the respondent engaged in woods operations on the limits and on the worksites of the respondent" (96 employees in unit) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer		96
Number of persons who cast ballots	59	
Number of ballots marked in favour of applicant		52
Number of ballots marked in favour of incumbent		7

**1481-87-R:** Ontario Public School Teachers' Federation (Applicant) v. The Durham Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its elementary panel in the Region of Durham" (284 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		284
Number of persons who cast ballots	73	
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	72	
Number of segregated ballots cast by persons whose names appear on voters' list	1	
Number of ballots marked in favour of applicant		60
Number of ballots marked against applicant		12
Ballots segregated and not counted		1

**1687-87-R:** International Woodworkers of America (Applicant) v. William Milne & Sons Ltd. (Respondent) v. Lumber & Sawmill Workers Union, Local 2693 of United Brotherhood of Carpenters & Joiners of America (Intervener)

Unit: "all employees of the respondent who are engaged in the sawmill, debarking, log piling and towing on Link Lake operations, save and except foremen, persons above the rank of foreman, scalers, office and sales staff" (106 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list		106
Number of persons who cast ballots	59	
Number of ballots marked in favour of applicant		55
Number of ballots marked in favour of intervener		4

**1769-87-R:** Ontario Secondary School Teachers' Federation (Applicant) v. The Board of Education for the City of York (Respondent)

Unit: "all occasional teachers employed by the respondent in its secondary panel in the City of York save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*" (218 employees in unit)

Number of names of persons on list as originally prepared by employer	218
Number of persons who cast ballots	27
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	24
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of ballots marked in favour of applicant	22
Number of ballots marked against applicant	2
Ballots segregated and not counted	3

### **Bargaining Agents Certified Subsequent to a Post-Hearing Vote**

**1329-87-R:** Service Employees Union, Local 183 (Applicant) v. Atlas Aluminum Products Ltd., c.o.b. as Edward Street Manor Nursing Home (Respondent) v. Group of Employees (Intervener)

Unit: "all employees of the respondent in the Village of Stirling, save and except supervisors, persons above the rank of supervisor, office and clerical staff, and persons in bargaining units for which any trade union held bargaining rights as of August 14, 1987" (52 employees in unit) (*Clarity Note*)

Number of persons on list as originally prepared by employer	52
Number of persons who cast ballots	51
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	50
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of ballots marked in favour of applicant	28
Number of ballots marked against applicant	22
Ballots segregated and not counted	1

### **Applications for Certification Dismissed Without Vote**

**0877-85-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Harnden & King Construction Ltd. (Respondent) v. Group of Employees (Objectors) (11 employees in unit)

**1003-86-R:** International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States & Canada, Local 58, Toronto (Applicant) v. Vaughan Attractions Ltd. (Respondent) v. Canada' Wonderland Ltd. (Intervener) (8 employees in unit)

**0086-87-R:** Labourers' International Union of North America, Local 1059 (Applicant) v. B & Brothers Cement Finishing Contractors (1987) Ltd., and Rite Forming Ltd. (Respondents) v. Group of Employees (Objectors) (10 employees in unit)

**1584-87-R:** Windsor Mouldmakers Union, Local 1680, C.C.C. (Applicant) v. Laval Tool & Mould Ltd. (Respondent) v. Group of Employees (Objectors) (41 employees in unit)

**1888-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Woodchuck Flooring Inc. (Respondent) (3 employees in unit)

**2031-87-R:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 71 (Applicant) v. Lundrigans Construction Ltd. (Respondent) (3 employees in unit)

**2055-87-R:** Canadian Union of Public Employees (Applicant) v. Strath Manor Ltd. (Respondent) (12 employees in unit)

**2117-87-R:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Applicant) v. Angelo Profetto Ontario Ornamental & Structural Iron (Respondent) (3 employees in unit)

**2229-87-R:** Ironworkers District Council of Ontario (Applicant) v. Metalbestos Erectors Ltd. (Respondent) (2 employees in unit)

**2301-87-R:** Hotel & Restaurant Employees Union, Local 605, AFL:CIO:CLC (Applicant) v. 564869 Ontario Ltd, c.o.b. as Viamede Resort (Respondent) (22 employees in unit)

#### **Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote**

**1388-87-R:** United Electrical, Radio & Machine Workers of America (UE) (Applicant) v. Westinghouse Canada Inc. (Respondent)

Unit: "all employees of the respondent in Alliston, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and technical staff" (31 employees in unit)

Number of names of persons on list as originally prepared by employer		31
Number of persons who cast ballots	31	
Number of ballots marked in favour of applicant		11
Number of ballots marked against applicant		20

#### **Applications for Certification Dismissed Subsequent to a Post-Hearing Vote**

**0709-87-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Greenspoon Brothers Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Brampton, save and except foremen, persons above the rank of foreman, office, sales and clerical staff, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of June 8, 1987" (18 employees in unit)

Number of names of persons on revised voters' list		18
Number of persons who cast ballots	15	
Number of ballots marked in favour of applicant		3
Number of ballots marked against applicant		12

**0719-87-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Set Construction Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman, in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell" (16 employees in unit)

Number of names of persons on revised voters' list		16
Number of persons who cast ballots	16	
Number of ballots marked in favour of applicant		6
Number of ballots marked against applicant		10

#### **Applications for Certification Withdrawn**

**1559-82-R:** Service Employees Union, Local 204, affiliated with S.E.I.U., AFL:CIO:CLC (Applicant) v. Broadway Manor Nursing Home (Respondent) v. Christian Labour Association of Canada (Intervener)

**0896-87-R:** Canadian Textile & Chemical Workers Union (Applicant) v. D-Craft Metal Products, division of Brydge Market Corp. (Respondent)

**1559-87-R:** International Association of Bridge, Structural & Ornamental Iron Workers, Local 786 (Applicant) v. 331265 Ontario Ltd, c.o.b. as G & P Welding & Iron Workers, Local 786 (Applicant) v. 331265 Ontario Ltd., c.o.b. as G & P Welding & Iron Works (Respondent)



**1796-87-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Samway Ltd. (Respondent)

**1829-87-R; 1830-87-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Scoralin Dillingham (Respondent)

**1866-87-R; 1868-87-R:** Labourers' International Union of North America, Local 493 (Applicant) v. Scoralin Dillingham (Respondent)

**2027-87-R:** Ironworkers District Council of Ontario (Applicant) v. Nickel City Welding Ltd. (Respondent)

**2141-87-R:** Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Applicant) v. C-Tech Ltd. (Respondent)

**2208-87-R:** United Steelworkers of America (Applicant) v. 704730 Ontario Ltd., c.o.b. as Algoma Manufacturing & Sales (Respondent)

**2219-87-R:** Canadian Brotherhood of Railway, Transport & General Workers (Applicant) v. Imperial Courier (Loomis Messenger) (Respondent) v. Service Employees International Union, Local 204 (Intervener)

**2228-87-R:** International Union of Bricklayers & Allied Craftsmen, Ontario Provincial Conference, Local 5 (Applicant) v. Aztec Contractors Inc. (Respondent)

**2485-87-R:** Labourers' International Union of North America (Applicant) v. Mater's Management Ltd., c.o.b. as Master's Homes (Respondent)

**2541-87-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Dominion Construction Company Ltd. (Respondent)

## **APPLICATIONS FOR FIRST CONTRACT ARBITRATION**

**1611-87-FC:** Ontario Secondary School Teachers' Federation (Applicant) v. Alma College (Respondent) (*Dismissed*)

## **APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER**

**2473-85-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Scofan Contractors Ltd., Genus Corporation, and Northspan Inc. (Respondents) (*Granted*)

**2494-85-R:** United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. Scofan Contractors Ltd., North Span Construction Inc., and Genus Corporation Ltd. (Respondents) (*Withdrawn*)

**0905-87-R:** International Ladies' Garment Workers' Union (Applicant) v. G.H. Sportswear Manufacturing Ltd., and Antoinette Fashions Ltd. (Respondent) (*Granted*)

**1202-87-R:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Downsview Plumbing & Heating Co. Ltd., Tani Plumbing Ltd., and Norfinch Plumbing Ltd. (Respondents) (*Withdrawn*)

**1731-87-R:** International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Strap Drywall & Acoustic Systems Ltd., and Strap Contracting Limited (Respondents) (*Withdrawn*)

**1880-87-R:** International Brotherhood of Electrical Workers Union, Local 1687 (Applicant) v. Wilglen Mechanical & Electrical Ltd., 140103 Canada Inc., c.o.b. as Sutherland Electrical Contractors (Respondents) (*Withdrawn*)

**2185-87-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Avery Construction Ltd., and Jeff Daniel Co. Ltd. (Respondents) (*Withdrawn*)

## SALE OF A BUSINESS

**2473-85-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Scofan Contractors Ltd., Genus Corporation and Northspan Inc. (Respondents) (*Granted*)

**2494-85-R:** United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicants) v. Scofan Contractors Ltd., North Span Construction Inc., and Genus Corp. Ltd. (Respondents) (*Withdrawn*)

**0857-87-R:** Hotel & Restaurant Employees Union, Local 75 (Applicant) v. Pine Crest Capital Corporation Ltd., c.o.b. as Windsor Park Hotel (Respondent) (*Granted*)

**0905-87-R:** International Ladies' Garment Workers' Union (Applicant) v. G.H. Sportswear Manufacturing Ltd., and Antoinette Fashions Ltd. (Respondent) (*Withdrawn*)

**1201-87-R:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Downsvew Plumbing & Heating Co. Ltd., Tani Plumbing Ltd., and Norfinch Plumbing Ltd. (Respondents) (*Withdrawn*)

**1265-87-R:** Labourers' International Union of North America, Ontario Provincial District Council & Labourers' International Union of North America, Local 1089 (Applicants) v. 625076 Ontario Ltd., c.o.b. as Exeter Road Enterprises, and Bre-Ex Ltd. (Respondents) (*Withdrawn*)

**1880-87-R:** International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. Wilglen Mechanical & Electrical Ltd., 140103 Canada Inc., c.o.b. as Sutherland Electrical Contractors (Respondents) (*Withdrawn*)

**2184-87-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Avery Construction Ltd., and Jeff Daniel Co. Ltd. (Respondent) (*Withdrawn*)

## UNION SUCCESSOR RIGHTS

**1530-87-R:** United Food & Commercial Workers, Local 278W (Applicant) v. United Cooperative of Ontario (Windsor Grain Terminal) (Respondent) (*Withdrawn*)

**1822-87-R:** Explosive Workers Independent Union, Northern Independent Union (Applicants) v. DuPont Canada Inc., and Fabrene Inc. (Respondents) (*Granted*)

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**2621-85-R:** Myles Cassim Moore (Applicant) v. United Food & Commercial Workers Union, Local 409, chartered by the United Food & Commercial Workers International Union, AFL:CIO:CLC (Respondent) v. F.W. Woolworth Co. Ltd. (Intervener)

Unit #1: "all employees of the respondent in its retail stores in the Municipality of Kenora, save and except assistant store managers, persons above the rank of assistant store manager, personnel manager, management trainee, office staff, service desk clerks, persons employed for less than 20 hours per week and students employed during the school vacation period" (57 employees in unit) (*Dismissed*)

Number of names of persons on list as originally prepared by employer	57
Number of persons who cast ballots	55
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	53

Number of segregated ballots cast by persons whose names appear on voters' list	2	
Number of ballots marked in favour of respondent		27
Number of ballots marked against respondent		26
Ballots segregated and not counted		2

Unit #2: "all employees of the respondent employed for less than 20 hours per week and students employed during the school vacation period in its retail stores in the Municipality of Kenora, save and except assistant store manager, persons above the rank of assistant store manager, personnel manager, office staff and service desk clerks" (15 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer		15
Number of persons who cast ballots	15	
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	14	
Number of segregated ballots cast by persons whose names appear on voters' list	1	
Number of ballots marked in favour of respondent		5
Number of ballots marked against respondent		9
Ballots segregated and not counted		1

**0354-86-R:** Employees of Corecon Construction (Applicants) v. United Brotherhood of Carpenters & Joiners of America, Local 27 (Respondent) v. Corecon Construction Ltd. (Intervener) (*Dismissed*)

**0444-87-R:** Tom Brown, et al. (Applicants) v. United Steelworkers of America, Local 8748 (Respondent) v. DDI Seamless Cylinder International Inc. (Intervener) (*Withdrawn*)

**0593-87-R:** Chris Compton, Sarah Klaiman, et al. (Applicants) v. Service Employees' International Union, Local 204 (Respondent)

Unit: "all employees of The Governing Council of the University of Toronto in the following classifications: Athletic Equipment Technician, Building Patrols I & II, Building Patrol (Bookstore), Bus Driver, Cafeteria Workers, Caretakers I & II, Carpet Shampoo Worker, Cashier, Cement & Brick Restorer, Chauffeur, Cook, Assistant Cook, Head Cook, Elevator Mechanic Helpers I & II, Gardeners I & II, Gardener-Grower, Housemaid Kitchen Worker, Laboratory Animal Technicians I, II & III, Laboratory Animal Transport Technician, Animal Laboratory Technologist I, II & III, Laboratory Animal Utility Technician, Laundry Attendant, Lead Hands I & II, Lead Hand Bus Driver, Lead Hand Cafeteria Workers, Lead Hand Cashier, Lead Hand Parking Attendant, Lead Hand Radiation, Lead Hand Radiation Laboratory Worker, Lead Hand Shipper (Faculty), Lead Hand Maintenance Worker, Lead Hand Storekeeper (Faculty), Lead Hand Storekeeper (Downsview Press), Lead Hand Utility Worker, Light Equipment Operator, Locker Room Attendant, Maintenance Workers I & II, Chief Maintenance Worker, Senior Maintenance Worker, Parking Attendant, Parking Tag Attendant, Printing Stock-Inventory Controller, Radiation Laboratory Worker, Receiver Clerk, Service Workers I, II & III, Service Worker (Radiation), Shippers I & II (Faculty), Shippers I & II (Downsview Press), Stores Assistant, Chief Shipper (Faculty), Chief Shipper (Downsview Press), Senior Shipper, Storekeepers I & II (Faculty), Storekeepers I & II (Downsview Press), Trades Helper, Utility Worker, Utility Driver, Vehicle Maintenance Attendant, save and except foremen, persons above the rank of foreman, office staff, employees working less than 10 hours per week, kitchen and dining hall employees in other than Whitney Hall, Sir Daniel Wilson Residence, University College Refectory, and Innis College" (771 employees in unit) (*Granted*)

Number of names of persons on revised voters' list		771
Number of persons who cast ballots	602	
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	598	
Number of segregated ballots cast by persons whose names do not appear on voters' list	4	
Number of spoiled ballots		6



Number of ballots marked in favour of respondent	140
Number of ballots marked against respondent	452
Ballots segregated and not counted	4

**1593-87-R:** Claude Brunet, on behalf of himself & other employees of The Corporation of the City of Cornwall (Applicant) v. Office & Professional Employees International Union (OPEIU), Local 452 (Respondent) v. The Corporation of the City of Cornwall (Intervener)

Unit: "all office, clerical and technical employees of The Corporation of the City of Cornwall, save and except department heads, deputy department heads, assistant department heads, purchasing agent, parks superintendent, tax and water collector, supervisor of the treasury office, chief inspector, assistant to the clerk-administrator and license issuer, professional engineers, public works superintendent, filtration plant superintendent, recreation director, assistant recreation director, treasury accountant, secretaries to the mayor, clerk-administrator, city treasurer and industrial commissioner, the personnel department, tax arrears collectors, social services field staff, public works foremen, engineering assistants, engineering accountant, parks foreman, all summer students employed in The Corporation of the City of Cornwall's parks and recreation summer programs, parking authority employees and persons covered by a certificate of the Board granted to the Canadian Union of Public Employees, Local 234" (109 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer		109
Number of persons who cast ballots	99	
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	97	
Number of segregated ballots cast by persons whose names do not appear on voters' list	2	
Number of ballots marked in favour of respondent		25
Number of ballots marked against respondent		72
Ballots segregated and not counted		2

**1650-87-R:** Mark Steven Barnett (Applicant) v. International Woodworkers of America (Respondent) v. Britannia Woodmoulding Co. Ltd. (Intervener)

Unit: "all employees of Britannia Woodmoulding Co. Ltd. in Mississauga, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (40 employees in unit) (*Granted*)

Number of names of persons on revised voters' list		40
Number of persons who cast ballots	34	
Number of ballots marked in favour of respondent		5
Number of ballots marked against respondent		29

**1735-87-R:** James Hohmeyer (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) (*Dismissed*)

**1743-87-R:** Jean Minor (Applicant) v. United Food & Commercial Workers Union, Local 175 (Respondent) v. Robin Hood Multifoods Inc., Glassgoods Division (Intervener) (*Dismissed*)

**1775-87-R:** Karl Bailey, and Robert Clark (Applicants) v. Teamsters Local 141 (Respondent) v. Tillsonburg Ready-Mix Concrete Ltd. (Intervener) (*Dismissed*)

**1780-87-R:** Raizada B.R. Sondhi (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local 2679 (Respondent) v. Freeformfive International (Intervener) (*Dismissed*)

**1785-87-R:** Larrie Rule (Applicant) v. Teamsters Local 419 (Respondent) v. Nedco, division of Westburne Industrial Enterprises (Intervener) (*Dismissed*)

**1987-87-R:** Alexander Cerqueira (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Umberto Di Marco (U.D.M. Excavating & Contracting Ltd.) (Intervener) (*Withdrawn*)

## MINISTERIAL REFERENCE

**1940-87-M:** N.E.R. Rentals Ltd. (Employer) and International Union of Operating Engineers, Local 793 (Trade Union) (*Withdrawn*)

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

**2256-87-U:** MacMillan Bathurst Inc. (Applicant) v. Canadian Paperworkers' Union, Local 1497 (Respondent) (*Dismissed*)

**2268-87-U:** MacMillan Bathurst Inc. (Applicant) v. Canadian Paperworkers' Union, Local 1497, Joao Amar-elo, and all hourly rated employees of the applicant who are not on layoff (Respondents) (*Dismissed*)

## APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

**2338-87-U:** Canadian Paperworkers' Union, Local 1497 (Applicant) v. MacMillan Bathurst Inc. (Respondent) (*Withdrawn*)

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**1237-85-U:** Jeanne St. Pierre (Complainant) v. United Automobile, Aerospace & Agricultural Implement Workers of America, U.A.W., Local 444, and Chrysler Canada Ltd. (Respondents) (*Granted*)

**0035-86-U:** United Food & Commercial Workers Union, Local 206 (Complainant) v. Knob Hill Farms Ltd. (Respondent) (*Granted*)

**3107-86-U; 1452-87-U:** London & District Service Workers' Union, Local 220 (Complainant) v. Durham Memorial Hospital (Respondent) (*Withdrawn*)

**0016-87-U:** Willy Merhar (Complainant) v. Teamster Local 938 (Respondent) v. Clarke Transport Canada Inc. (Intervener) (*Dismissed*)

**0135-87-U:** Canadian Union of Hotel & Restaurant Employees, Local 88 (Complainant) v. General Mills Canada Inc., c.o.b. as Red Lobster Restaurant (Respondent) (*Withdrawn*)

**0262-87-U:** Hewlette Charles (Complainant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), Local 1661 (Respondent) v. Duplate, division of PPG Canada Inc. (Intervener) (*Dismissed*)

**0265-87-U:** John Dranjec (Complainant) v. Retail, Wholesale & Department Store Union, Local 414, AFL-CIO:CLC, Domgroup Ltd., and Willet Foods Ltd. (Respondents) (*Dismissed*)

**0423-87-U:** Ontario Public Service Employees Union (Complainant) v. Progress Place (Respondent) (*Withdrawn*)

**0579-87-U:** Energy & Chemical Workers Union, Local 593 (Complainant) v. Pennwalt Inc. (Respondent) (*Dismissed*)

**1041-87-U:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), Local 1967 (Complainant) v. McDonnell Douglas Canada Ltd. (Respondent) (*Granted*)

**1049-87-U:** John Craddock, Ray Buttineau, et al. (Complainants) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 527 (Respondent) (*Dismissed*)

- 1084-87-U:** Gary Walsh (Complainant) v. Canadian Union of Public Employees, Local 43 (Respondent) v. The Municipality of Metropolitan Toronto (Intervener) (*Dismissed*)
- 1140-87-U:** Labourers' International Union of North America, Ontario Provincial District Council (Complainant) v. Lakh Construction Corp., and Jay Hardware Ltd. (Respondents) (*Granted*)
- 1175-87-U:** Canadian Textile & Chemical Union (Complainant) v. D-Craft Metal Products, division of Brydge Market Corp. (Respondent) (*Withdrawn*)
- 1278-87-U:** Labourers' International Union of North America, Local 1059 (Complainant) v. Kent Concrete Forming Ltd. (Respondent) (*Withdrawn*)
- 1327-87-U:** International Union of Operating Engineers, Local 793 (Complainant) v. Labourers' International Union of North America, Local 506, and Cana Construction Co. Ltd. (Respondents) (*Withdrawn*)
- 1419-87-U:** International Beverage Dispensers' & Bartenders' Union, Local 280, of the Hotel & Restaurant Employees & Bartenders International Union (Complainant) v. John Katsuras, c.o.b. as KRUSH (Respondent) (*Granted*)
- 1580-87-U:** Bob Pearce, Clayton Emery, and Ken Wray (Complainants) v. U.F.C.W., Locals 175 and 633 (Respondents) v. United Food & Commercial Workers International Union, Local 1000A (Intervener) (*Withdrawn*)
- 1644-87-U:** Stephen Lukicek (Complainant) v. Pailing Incorporated (Respondent) (*Withdrawn*)
- 1745-87-U:** London & District Services Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Complainant) v. Winston Hall Nursing Homes Ltd. (Respondent) (*Withdrawn*)
- 1757-87-U:** United Food & Commercial Workers International Union (Complainant) v. Silas McCabes Restaurant Tavern (Respondent) (*Withdrawn*)
- 1786-87-U:** United Brotherhood of Carpenters & Joiners of America, Local 2679 (Complainant) v. Freeformfive International Inc. (Respondent) (*Withdrawn*)
- 1827-87-U:** Labourers' International Union of North America, Local 1059 (Complainant) v. 643210 Ontario Ltd., operated by M. Concrete Forming (Respondent) (*Granted*)
- 1863-87-U:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Complainant) v. 331265 Ontario Ltd., c.o.b. as G & P Welding & Ironworks (Respondent) (*Withdrawn*)
- 1883-87-U:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Ambertex Inc. (Respondent) (*Withdrawn*)
- 1913-87-U:** Canadian Union of Public Employees, Local 161 (Complainant) v. Laurentian Hospital (Respondent) (*Withdrawn*)
- 1942-87-U:** Service Employees International Union, Local 183 (Complainant) v. Atlas Aluminum Products Ltd., c.o.b. as Edward Street Manor Nursing Home (Respondent) (*Withdrawn*)
- 1954-87-U:** Teamsters Local 879, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Alltype Metal Stampings Ltd., and Joe Fennema (Respondents) (*Withdrawn*)
- 1964-87-U:** Labourers' International Union of North America, Local 1059 (Complainant) v. Esam Construction Ltd. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener) v. Group of Employees (Objectors) (*Withdrawn*)



**1965-87-U:** Meena Sharma (Complainant) v. Rowntree Mackintosh Canada Ltd. (Respondent) (*Withdrawn*)

**1994-87-U:** International Ladies' Garment Workers' Union (Complainant) v. Sheldon M. Kasman Ltd. (Respondent) (*Withdrawn*)

**2072-87-U:** Harry Blay, Cumberland Clothing (Complainant) v. United Garment Workers of America, Local 253 (Respondent) (*Withdrawn*)

**2116-87-U:** United Steelworkers of America (Complainant) v. Jireh Machseh Ltd., c.o.b. as Pathways Retirement Home (Respondent) (*Withdrawn*)

**2128-87-U:** Canadian Paperworkers Union, Local 89 (Complainant) v. International Brotherhood of Electrical Workers, Local 1149 (Respondent) v. Spruce Falls Power & Paper Co. Ltd., and Kimberly-Clark of Canada Ltd. (Intervenors) (*Withdrawn*)

**2148-87-U:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Complainant) v. Nelson Materials Handling Ltd. (Respondent) (*Withdrawn*)

**2203-87-U:** Glenn W. Ellis (Complainant) v. Mrs. L. Grier, president of Service Employees Union, Mr. D. Burshaw, president of Local 183, Mr. T. Young, chief steward of Local 183, and Mr. W. Koomen, shop steward (Respondents) (*Withdrawn*)

**2218-87-U:** Labourers' International Union of North America, Local 506 (Complainant) v. International Union of Operating Engineers, Local 793, and Cana Construction Co. Ltd. (Respondents) (*Withdrawn*)

**2253-87-U:** Labourers' International Union of North America, Local 1059 (Complainant) v. Esam Construction Ltd. (Respondent) (*Withdrawn*)

**2293-87-U:** Nelson Materials Handling Ltd. (Complainant) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Respondent) (*Withdrawn*)

**2298-87-U:** Charles Conlin (Complainant) v. Rom Hutton, Mike Johnson, and General Motors Oshawa, Local 222 (Respondents) (*Dismissed*)

**2308-87-U:** Albert M. Waggett (Complainant) v. Bruce Mordue, officer of U.S.W.A., Local 1005, and/or U.S.W.A., Local 1005 (Respondents) (*Dismissed*)

**2366-87-U:** Sudbury Mine, Mill & Smelter Workers Union, Local 598 (Complainant) v. E & R Jewell Contracting Ltd. (Respondent) (*Withdrawn*)

**2375-87-U:** Brian L. DeLong, and Gerald F. Reade (Complainants) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Respondent) (*Withdrawn*)

## **APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT**

**1951-87-M:** Holiday Inn Toronto-Scarborough, of the Commonwealth Holiday Inns of Canada Ltd. (Employer) and Hotel & Restaurant Employees Union, Local 75 of the Hotel & Restaurant Employees International Union, AFL:CIO:CLC (Trade Union) (*Granted*)

**1957-87-M:** Canadian General-Tower Ltd. (Employer) and United Rubber, Cork, Linoleum & Plastic Workers of America, Local 862 (Trade Union) (*Granted*)

**2139-87-M:** Willett Foods Inc. (Employer) and Retail, Wholesale & Department Store Union, Local 414 (Trade Union) (*Granted*)

**2291-87-M:** WorkWear Corp. of Canada Ltd. (Employer) and Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (formerly Laundry, Dry Cleaning & Dye House Workers' International Union, Local 351) (Trade Union) (*Granted*)

**2434-87-M:** Black Clawson-Kennedy Ltd. (Employer) and United Steelworkers of America, Local 2469 (Trade Union) (*Granted*)

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**2072-86-JD:** Canadian Union of Public Employees, Local 2974.1 (Complainant) v. The Corporation of the County of Essex, and Teamsters, Chauffeurs Warehousemen & Helpers Union, Local 880 (Respondents) (*Withdrawn*)

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**2597-86-M:** Educational Support Staff Association (Applicant) v. Waterloo County Board of Education (Respondent) (*Granted*)

**2968-86-M:** Canadian Union of Public Employees (Applicant) v. Oxford County Board of Health (Respondent) (*Granted*)

## **COMPLAINTS UNDER THE OCCUPATIONAL HEALTH & SAFETY ACT**

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**1336-87-OH:** Helmut A. Umbrasas (Complainant) v. Maitland Lewis Motors (Respondent) (*Withdrawn*)

**1726-87-OH:** A. Daniel Green (Complainant) v. Cannet Freight & Cartage Ltd., and Paul Publow or agents on his behalf (Respondents) (*Withdrawn*)

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**1503-83-M:** International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. F.D.V. Construction Ltd., 515112 Ont. Ltd., c.o.b. as Bluebird Construction, 556631 Ont. Ltd., c.o.b. as G.P. Construction, and The Electrical Contractors' Association of Ontario (Respondents) (*Granted*)

**2957-85-M:** International Union of Operating Engineers, Local 793 (Applicant) v. Scofan Contractors Ltd., Genus Corp., and Northspan Inc. (Respondents) (*Withdrawn*)

**0670-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Dawn Enterprises Ltd. (Respondent) (*Withdrawn*)

**0814-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 1946 (Applicant) v. Ellis-Don Ltd. (Respondent) (*Withdrawn*)

**0895-87-G:** Labourers' International Union of North America, Local 527 (Applicant) v. Ottawa-Carleton Brick Laying & Masonry Ltd. (Respondent) (*Granted*)

**1089-87-G:** International Union of Elevator Constructors, Local 90 (Applicant) v. Dover Corporation (Canada) Ltd. (Respondent) v. National Elevator & Escalator Association (Intervener) (*Granted*)

**1200-87-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Downsvie Plumbing & Heating Co. Ltd., Tani Plumbing Ltd., and Norfinch Plumbing Ltd. (Respondents) (*Withdrawn*)

**1890-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. E & D Scaffolding Services Ltd. (Respondents) (*Granted*)

**1909-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Suburban Plastering Co. (Respondent) (*Granted*)

**1915-87-G:** Sheet Metal Workers' International Association, Local 397 (Applicant) v. Laurentian Insulations (1982) Ltd. (Respondent) (*Withdrawn*)

**2012-87-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Calorific Construction Ltd. (Respondent) (*Granted*)

**2121-87-G:** Labourers' International Union of North America, Local 1089 (Applicant) v. Jafco Construction Ltd. (Respondent) (*Granted*)

**2122-87-G:** Labourers' International Union of North America, Local 1089 (Applicant) v. Di Cocco Contractors Ltd. (Respondent) (*Granted*)

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**2133-87-G:** Labourers' International Union of North America, Local 493 (Applicant) v. Nu-Style Construction Ltd. (Respondent) (*Withdrawn*)

**2135-87-G:** Labourers' International Union of North America, Local 493 (Applicant) v. Copper Cliff Mechanical Contractors Ltd. (Respondent) (*Withdrawn*)

**2136-87-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 759 (Applicant) v. Intercity Welding & Fabricating (Thunder Bay) Inc. (Respondent) (*Granted*)

**2155-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Bay Forming Inc., and The Residential Low-Rise Forming Contractors' Association of Metropolitan Toronto & Vicinity (Respondents) (*Granted*)

**2181-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Lucy Construction Ltd. (Respondent) (*Withdrawn*)

**2202-87-G:** International Union of Bricklayers & Allied Craftsmen, Ontario Provincial Conference (Applicant) v. Gabriele Carpet Centre Ltd. (Respondent) (*Withdrawn*)

**2217-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Eastern Construction Co. Ltd. (Respondent) (*Granted*)

**2240-87-G:** International Brotherhood of Painters & Allied Trades, Local 200, Ontario District Council (Applicant) v. Robert Jean Installations Inc. (Respondent) (*Granted*)

**2242-87-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Courtice Auto Wreckers Ltd. (Respondent) (*Withdrawn*)

**2250-87-G:** Drywall, Acoustics, Lathing & Insulation Local 675, of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Ben Plastering Ltd., c.o.b. as Belmont Plastering (Respondent) (*Granted*)

**2251-87-G:** Drywall, Acoustic, Lathing & Insulation Local 675, of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Crest Drywall & Acoustics Ltd. (Respondent) (*Granted*)

**2252-87-G:** Drywall, Acoustic, Lathing & Insulation Local 675, of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Marel Contractors Ltd. (Respondent) (*Withdrawn*)



- 2266-87-G:** Labourers' International Union of North America, Local 607 (Applicant) v. G.M. Gest Inc. (Respondent) (*Withdrawn*)
- 2267-87-G:** Carpenters' District Council of Toronto & Vicinity, Local 27, of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. D.E.S. Carpentry (Respondent) (*Granted*)
- 2270-87-G:** Drywall, Acoustic, Lathing & Insulation Local 675, of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Brunswick Drywall (Ontario) Ltd. (Respondent) (*Withdrawn*)
- 2271-87-G:** Drywall, Acoustic, Lathing & Insulation Local 675, of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Nap Mon Construction Ltd. (Respondent) (*Withdrawn*)
- 2272-87-G:** Drywall, Acoustic, Lathing & Insulation Local 675, of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Progressive Drywall & Interior Systems (Respondent) (*Withdrawn*)
- 2273-87-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 552 (Applicant) v. Kel Gor Ltd. (Respondent) (*Granted*)
- 2285-87-G:** Labourers' International Union of North America, Local 607 (Applicant) v. Acme Building & Construction Ltd. (Respondent) (*Withdrawn*)
- 2318-87-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Cooper's Crane Rental Ltd. (Respondent) (*Withdrawn*)
- 2320-87-G:** Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 880 (Applicant) v. Len Taylor Trucking (Respondent) (*Withdrawn*)
- 2324-87-G:** Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 880 (Applicant) v. Doug Price Trucking (Respondent) (*Withdrawn*)
- 2344-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Anzano Construction Ltd. (Respondent) (*Granted*)
- 2345-87-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 759 (Applicant) v. Mallet Reinforcing Steel (Respondent) (*Granted*)
- 2355-87-G:** Labourers' International Union of North America, Local 1036 (Applicant) v. Commonwealth Construction Co. Ltd. (Respondent) (*Withdrawn*)
- 2418-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Tony Dimonte Drainage Ltd. (Respondent) (*Withdrawn*)
- 2419-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Oren Pkg. Inc. (Respondent) (*Withdrawn*)
- 2430-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Serr-Can Paving (710579 Ont. Ltd.) (Respondent) (*Withdrawn*)
- 2443-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Landford Developments Ltd. (Respondent) (*Withdrawn*)
- 2476-87-G:** Labourers' International Union of North America, Local 506 (Applicant) v. Anzano Construction Ltd. (Respondent) (*Granted*)
- 2492-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Lab-Car Construction Inc. (Respondent) (*Withdrawn*)

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**0356-86-R:** J. Marie Walton (Applicant) v. Ontario Nurses' Association (Respondent) v. Brantwood Manor Nursing Home (Intervener) (*Dismissed*)

**1678-86-U:** Hyacinth Davidson (Complainant) v. R.W.D.S.U., Local 414 (Respondent) (*Dismissed*)

**2817-86-R:** International Brotherhood of Electrical Workers, Local 894 (Applicant) v. Graff Diamond Products Ltd. (Respondent) v. Labourers' International Union of North America, Local 506 (Intervener #1) v. Labourers' International Union of North America, Ontario Provincial District Council (Intervener #2) (*Dismissed*)

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**0849-87-JD:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Complainant) v. Catalytic Maintenance Inc., Petro-Canada Products, division of Petro-Canada Inc., and Energy & Chemical Workers Union, Local 353 (Respondents) (*Dismissed*)

**1169-87-M; 1170-87-M:** Tony Hoosain (Complainant) v. United Brotherhood of Carpenters & Joiners of America, Local 27, and District Council (Respondents) (*Dismissed*)

**1241-87-R:** Labourers' International Union of North America, Ontario Provincial Council (Applicant) v. Stephen Sura (Canada) Ltd. (Respondent) (*Dismissed*)

**1261-87-R:** United Steelworkers of America (Applicant) v. St. Mary's Cement Corp. (Respondent) (*Granted*)

**1534-87-R:** United Food & Commercial Workers Union, Local 278W (Applicant) v. United Cooperatives of Ontario (Cootam & Essex) (Respondent) (*Granted*)

**1628-87-M:** Hawkesbury & District General Hospital (Applicant) v. Ontario Nurses' Association (Respondent) (*Withdrawn*)

**1926-87-R:** Quaker Oats Employees Independent Union (Cereals) (Applicant) v. The Quaker Oats Co. of Canada Ltd. (Respondent) v. United Food & Commercial Workers, Local 293 (Intervener) (*Dismissed*)

**1961-87-R:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers of America (Applicant) v. Volcano Industries Inc. (Respondent) (*Dismissed*)

**1986-87-U:** Teamsters Local 280, Ready Mix, Building Supplies, Hydro, Construction Drivers, Warehousemen & Helpers Union (Complainant) v. St. Mary's Cement Corp., and United Steelworkers of America (Respondents) (*Granted*)

## RIGHT OF ACCESS

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**2050-87-M:** International Union of Operating Engineers, Local 793 (Applicant) v. Madeleine Mines Ltd. (Respondent) (*Granted*)

**2239-87-M:** Labourers' International Union of North America, Local 607 (Applicant) v. Ledcor Industries Ltd., and Castonguay Blasting Ltd. (Respondents) (*Granted*)



















*Ontario Labour Relations Board,  
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# **ONTARIO LABOUR RELATIONS BOARD REPORTS**

**February 1988**



Ontario



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**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1988] OLRB REP. FEBRUARY**

**EDITOR: COLLEEN EDWARDS**

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

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**1962-87-R Ontario Liquor Board Employees' Union, Applicant v. Blue Water Bridge Duty Free Shop Inc., Respondent**

**Certification - Constitutional Law - Whether Board having constitutional jurisdiction over the labour relations of a duty-free shop at a bridge border crossing - Pervasive federal regulation not touching upon labour relations matters - Operation not a federal business, work or undertaking nor is it integrally connected to a federal undertaking - Board having jurisdiction**

**BEFORE:** *Robert Herman*, Vice-Chair, and Board Members *W. H. Wightman* and *R. R. Montague*.

**APPEARANCES:** *Bernard Fishbein* and *John Stevens* for the applicant; *Norman A. Keith* and *Garvin Lee* for the respondent.

**DECISION OF THE BOARD;** February 11, 1988

1. In this certification application, the Board heard the evidence and submissions of the parties and ruled orally that it had constitutional jurisdiction over the labour relations of the employer. We now provide our reasons.

2. The employer operates a duty-free shop at a bridge border crossing in the Province of Ontario. The duty-free shop is located on federal government land in the "sterile" area at the border crossing, within the area of "no return", access to which is obtained only upon passing through toll booths. Once the toll booths are passed, and access therefore available to the premises of the employer's duty-free shop, an individual must cross the bridge and pass through American Customs, and return across the bridge and pass through Canadian Customs in order to exit the sterile area back into Canada.

3. The employer filed a tender proposal with the federal government, and upon approval was authorized to set up the duty-free shop. The federal government, through various licensing and regulatory procedures, regulates the location of the duty free shops, their premises and the goods being sold in the shops. The government monitors numerous and detailed aspects of the sale of goods in the store, including inventory, invoicing, and the collection of excise taxes with respect to sales. It is fair to say that the duty-free shop of the employer would not exist but for federal approval and regulatory control.

4. Contrasting such control over the physical aspects of the business, there is very little, if any, federal control or influence over the labour relations aspects of the duty-free shop. The licensing conditions do require that the employer notify the appropriate branch of the federal government of any changes in managerial personnel, but it is clear that federal permission is not needed for the hiring of managerial personnel. The employer submits the names of new employees to the federal government for screening as to whether the individual in question has a criminal record, but such submission is voluntary. In any event, the hiring and firing of employees is the sole prerogative of the employer. The federal government does insist that sufficient number of employees be bilingual but imposes no hiring quota with respect to language ability. Beyond this one requirement however, all labour relations matters are in the exclusive discretion of the employer. The employer decides how many employees to hire, which employees to hire, how much to pay employees, all terms and conditions of employment, the hours of operation of the duty-free shop, and so on. The employer is solely responsible for labour relations matters, including the firing or disciplining of employees.

5. In effect, the respondent operates a retail store, albeit in a duty-free setting at a border crossing. Neither the respondent nor its employees attempt in any fashion to monitor whether customers actually continue over the bridge and cross into the United States. The business is not one of customs and excise, nor of running a border crossing.

6. The respondent argued that its labour relations were under federal jurisdiction on two grounds: first, the respondent itself was engaged in a federal business, work, or undertaking, in that it was itself engaged in export, customs and excise, or taxing; and secondly, in the alternative, the respondent was integrally connected or related to a federal work or undertaking, that of customs and excise.

7. The Board is satisfied that the respondent falls within provincial jurisdiction for purposes of labour relations matters. The respondent is not itself a federal business, work or undertaking, within the meaning of the *Constitution Act*, nor can we say that it is so integrally related to such a federal matter that it should be found to fall within federal jurisdiction. Notwithstanding the pervasive federal regulation and the fact that the business of the employer only exists because of federal approval, the regulation or approval does not touch in any meaningful sense upon labour relations matters. The respondent runs the equivalent of a retail sales outlet, under the control and authorization of the federal government, but nevertheless a retail store. A business is not a federal business, work, or undertaking if it is in essence a retail store in the Province of Ontario, whether or not the store is located on federal land and operates out of a federally owned building. Similarly, the Board does not find that the existence and operation of the duty-free shop is so integrally connected to the federal undertaking, the operation of a border crossing that it ought to be found to be within federal jurisdiction. It is clear on the facts that the operation of a duty-free shop is not in any way necessarily incidental to the operation of the border crossing. Indeed, the border crossing in question existed and operated fully prior to the setting up of any duty free shop at this location.

8. Without reciting any of the numerous cases referred to the Board by counsel for the respondent (the Board did not call upon counsel for the applicant to make submissions on the constitutional issue), we would refer the parties to a prior decision of this Board which appears on point. In *Toronto Auto Parks (Airport) Limited*, [1978] OLRB Rep. July 682, the Board dealt with the labour relations jurisdiction over the employer operating the public parking facilities owned by the federal government at the Toronto International Airport. As in the instant case, the respondent in that case was both authorized and monitored by the federal government, and its services were utilized by those using a clearly federal service, in that case the airport's aeronautic services.

9. The respondent in that case argued the same two grounds for federal jurisdiction, either that the respondent's business was itself a federal work or undertaking, or in the alternative that it was integrally related to a federal work or undertaking. The Board therein made the following comments, which appear to us to be applicable to the instant case:

17. In considering these cases, it would appear that federal jurisdiction over aeronautics applies to aircrew, persons who service and refuel aircraft, and to those who load luggage on to airplanes, but that provincial legislation applies to employees engaged in transporting passengers and aircrew to and from the airport terminal and to porters who carry luggage into the airport terminal. We are satisfied that the services provided by the respondent's employees in this case are similar in nature to the type of activity referred to in the *Colonial Coach Lines* and *Murray Hill* cases, such that while they provide a convenience to the travelling public, they are not sufficiently integral to aeronautics to bring them within federal legislative jurisdiction.

18. As a final word on this matter we would note that our conclusion in this regard appears to be supported by the basic reasoning underlying what are perhaps the two leading authorities on the



question of the scope of federal legislative authority over labour relations, namely the decision of the Supreme Court of Canada in the Stevedoring case and the decision of the Judicial Committee of the Privy Council in the Empress Hotel case. In the Stevedoring case it was held that Stevedoring work fell within the scope of federal jurisdiction over navigation and shipping, while in the Empress Hotel case the operation of a hotel was held not to come within Parliament's jurisdiction to legislate with respect to an inter-provincial railway. The decision in the Empress Hotel case was based on the conclusion that while the operation of the hotel was of assistance to the C.P.R.'s railway business, nevertheless it was in fact a separate undertaking. However, as noted by Donohue J. in the Colonial Coach Lines case, the Stevedoring case involved the "loading, stowage and unloading of cargo (which) is in a very real sense a critical part of the marine trade and practice." The distinction between these two cases, simply put, is that while a navigation service cannot function without the services of stevedores, a railway can function without hotel staff. Similarly with respect to aviation, while an aviation service requires the services of the people who fly, load and service the airplanes, it can be provided without the services of those who drive limousines to the airport, carry luggage into the terminals and run restaurants and shops on the airport. Similarly, an aviation service can be provided without the services of employees who operate pay-parking facilities and retrieve self-service luggage carts.

19. The second basis of the respondent's claim that the Board lacks jurisdiction over its operations is that it is essentially carrying on the business of the federal government.

• • •

24. From the terms of the contract it would appear that the respondent has been retained by the Federal Government to operate and manage its parking facilities and to run a luggage cart retrieval service under some fairly tight terms, and that failure to adhere to those terms may result in the contract being terminated by the Government without any compensation being payable to the respondent.

25. One thing that is made clear by the contract is that the persons engaged in the work therein described are employees of the respondent and not of the Federal Government...It is also of some importance that while the contract provides that the Airport General Manager can give directions to the respondent at no point does the Federal Government retain the right to directly control the employees in the performance of their work, instead such control rests with the respondent...

• • •

28. A case even closer to the one before us, in that it involved a contract directly between a private contractor and the Federal Government for work to be performed on federally owned land is *Mid Valley Construction Limited v. Alberta Board of Industrial Relations* 74 CLLC para. 14,243. (Alta S.C.). In that case Mr. Justice Lieberman upheld a decision of the Alberta Board that it had jurisdiction to certify a Union with respect to employees of a private contractor engaged in the construction of a highway in a provincial park. The contractor was performing the work pursuant to a contract it had entered into with the federal Department of Public Works. At p 40l of the decision is contained the following comment:

"Counsel for the applicants sought to distinguish what is commonly known as the Jasper Park Lodge case on the basis that the Jasper Park Lodge was operated by the Canadian National Railways on property leased from the Federal Government within the Park, and that in the case before me the employees applying for certification were employed by an independent contractor who contracted directly with the Department of Public Works and that the independent contractor had no interest, leasehold or otherwise in the land. I cannot distinguish the case on that basis."

We would also note that the Colonial Coach Lines case referred to above involved a company operating under a lease from the Federal Government.

29. We are satisfied on the reasoning underlying these cases that the fact that the respondent entered into a contract with the Federal Government to perform certain activities on federally owned property does not bring its labour relations within the ambit of federal labour law. The

work involved does not come within, nor is it necessarily incidental to, any subject matter falling within federal legislative jurisdiction. Therefore provincial labour relations law is applicable.

10. For similar reasons, the Board was satisfied that it had jurisdiction over the respondent and it so decided at the hearing into this matter.

11. Subsequent to the hearing, a representation vote was directed. No statement of desire to make representations has been filed with the Board within the time fixed under subsection 1 of section 70 of the Board's Rules of Procedure following the taking of the representation vote pursuant to the Board's direction in this matter.

12. On the taking of the representation vote directed by the Board not more than fifty per cent of the ballots cast were cast in favour of the applicant.

13. The application is therefore dismissed.

14. The Board will not entertain an application for certification by the applicant with respect to any of the employees of the respondent in the bargaining unit within the period of six months from the date hereof.

15. The Registrar will destroy the ballots cast and the representation vote taken in this matter following the expiration of thirty days from the date of this decision unless the statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such thirty day period.

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**2747-84-JD** International Association of Machinists and Aerospace Workers, Lodge 771, Complainant v. **Boise Cascade Canada Ltd.**, and International Brotherhood of Electrical Workers, Local Union 1744, Respondents

**Jurisdictional Dispute - Practice and Procedure - Board member dying before completion of case - Board exercising its discretion under section 103(2)(h) to authorize the vice-chair to inquire into this application and report to the Board - Vice-Chair to make findings of fact on the basis of the evidence which has been and will be adduced before him**

**BEFORE:** *Inge M. Stamp*, Vice-Chair, and Board Members *W. A. Correll* and *P. V. Grasso*.

**APPEARANCES:** *James K. McDonald*, *Lowell Paulson* and *Linda Huebscher* for the complainant; *Peter J. Thorup*, *William B. Murray* and *Jim Garshore* for the respondent employer, and *S. B. D. Wahl*, *D. Langtry* and *R. Sproule* for the respondent union.

**DECISION OF THE BOARD;** February 25, 1988

1. A hearing was convened before this panel of the Board to hear the submissions of the parties on how this matter should proceed in view of the untimely death of Board Member J. P. Wilson, who was one of the three persons on the original panel (chaired by Vice-Chair Robert J. Herman) assigned to hear this complaint under section 91 of the *Labour Relations Act*. (For ease of reference that panel is referred to in this decision as the "Herman panel".)

2. This complaint was filed January 14, 1985. Approximately 24 days of hearing (preceded by 12 days of pre-hearing conference) have already taken place before the Herman panel. A large number of exhibits, including books of detailed technical information on the equipment in dispute, have been filed. These voluminous exhibits fill a number of large cardboard boxes. The complainant completed its case, but neither of the respondents have as yet commenced their cases.
3. Prior to the death of Board Member Wilson, the Herman panel ruled that a motion for non-suit by the International Brotherhood of Electrical Workers, Local Union 1744 ("IBEW") would be considered without putting that party to an election as to whether or not it would adduce any evidence.
4. The positions of the parties on how to proceed in these circumstances are summarized below.
5. The respondent IBEW submitted that the Board should not follow its jurisprudence in *Spruce Falls Power and Paper Company Limited*, [1985] OLRB Rep. Dec. 1802. The Board should assign to the Herman panel another member representative of employers to replace Board Member Wilson, and continue with the hearing of this complaint. If the Board did not feel it was appropriate to make such a substitution, a second option in the IBEW's submission is to have Vice-Chair Herman continue to hear the case by himself. Counsel for the respondent IBEW urged the Board to use its powers under section 102(13) of the *Labour Relations Act* to make the substitution.
6. Counsel for the IBEW put before the Board a number of arbitration awards dealing with somewhat similar situations which have occurred in the context of grievance arbitrations. However, these cases do not assist the Board, since unlike a board of arbitration, whose powers are derived from a collective agreement and section 44 of the Act, this Board's powers are derived solely from the legislation which it administers.
7. As a third option, counsel for the IBEW contended that if the Board follows the *Spruce Falls* decision, *supra*, the Board should exercise its discretion under section 103(2)(h) of the Act to authorize Vice-Chair Herman to inquire into this application and report to the Board. In this regard, IBEW Counsel asks that Vice-Chair Herman be authorized, pursuant to section 103(2)(h), to inquire into this jurisdictional dispute, and to use the evidence led before him during the aforementioned 24 days of hearing to determine the non-suit issue.
8. The respondent Boise Cascade Canada Ltd. (the "Company") is prepared to agree to the substitution of another Board Member to replace Board Member Wilson, or to other arrangements which would facilitate continuing with this jurisdictional dispute, including the assignment of two new sidespeople. The Company is also prepared to have Vice-Chair Herman sit alone to complete the case, although it is of the view that the most practical solution would be to assign a substitute for Board Member Wilson. The Company counsel stated that the only possible party to be prejudiced by such a substitution would be the employer since it is the member representative of employers who is being replaced. If there is no substitution or appointment under section 103(2)(h) of the Act and a *de novo* hearing is to be held, then the company will request consolidation with a complaint filed on September 29, 1987 involving the identical issues (File No. 1770-87-JD).
9. In response to the IBEW'S and the Company's submissions on how to proceed, counsel for the complainant International Association of Machinists and Aerospace Workers, Lodge 771 ("IAM") states that the Board has no jurisdiction to permit Vice-Chair Herman to continue on his own or to assign another Board Member to replace Board Member Wilson. The inconvenience and additional costs to the parties do not confer jurisdiction. The Board is a statutory creature, and



absent consent, there is no jurisdiction to replace a deceased Board Member. Once a panel loses its quorum, it is *functus* and cannot continue with a complaint.

10. With respect to the appointment under section 103(2)(h) of the Act, it is the complainant's position that this is not an appropriate case in which to make such an appointment. Complainant's counsel submitted that it would be a denial of natural justice for the Board to consider what took place during 24 days of hearing conducted by the Herman panel. The IAM further submits that if the Board does find it appropriate to appoint a Vice-Chair under section 103(2)(h) of the Act, it would be contrary to principles of natural justice to appoint Vice-Chair Herman.

11. There is no doubt that in the absence of consent of the parties, the Board lacks jurisdiction to assign a Board Member to replace a Board Member who dies or becomes incapacitated. In *Spruce Falls, supra*, another panel of the Board stated:

7. The *Labour Relations Act*, unlike provisions contained in the *Courts of Justice Act*, 1984, S.O. 1984, c.11 and the *Canada Labour Code*, does not contain any provision which would enable the Board to replace a member of a panel who is unable to complete his or her duties because of illness or, for that matter, death. ...

12. Counsel for the complainant's main concern with respect to an appointment under section 103(2)(h) of the Act dealt with what he contended to be a denial of natural justice to his client. Section 103 of the Act provides, in part, as follows:

103.-(1) The Board shall exercise such powers and perform such duties as are conferred or imposed upon it by or under this Act.

(2) Without limiting the generality of subsection (1), the Board has power,

...

(h) to authorize the chairman or a vice-chairman to inquire into any application, request, complaint, matter or thing within the jurisdiction of the Board, or any part of any of them, and to report to the Board thereon.

Section 106(3) of the Act provides:

106.-(3) Where the Board has authorized the chairman or a vice-chairman to make an inquiry under clause 103(2)(h), his findings and conclusions on facts are final and conclusive for all purposes, but nevertheless he may, if he considers it advisable to do so, reconsider his findings and conclusions on facts and vary or revoke any such finding or conclusion.

13. If an appointment is made under section 103(2)(h) of the Act appointing Vice-Chair Herman, what is the effect on the complainant and the respondents? The complainant had completed its evidence before a panel chaired by Vice-Chair Herman. If Vice-Chair Herman continues to inquire into the facts of this complaint, how is the complainant in any different position than the respondents? There is no advantage conferred upon any party by proceeding in this manner. All parties will have full opportunity to present their evidence before Vice-Chair Herman.

14. This complaint is what may aptly be described as a pure jurisdictional dispute. From the submissions of the parties, it appears that the dispute has been brought about primarily by technological change. It does not involve extensive issues of credibility, but rather a large number of detailed factual matters on the basis of which the Board will be called to determine how this work is to be done in the future and by whom. There is no prejudice to any of the parties to this proceeding in having Vice-Chair Herman inquire into those factual matters and report to the Board. There is absolutely no valid labour relations purpose whatever which would be served by having

this matter reheard from the beginning. Indeed, the additional expense and delay which this would entail would undoubtedly be prejudicial from a labour relations perspective. Thus, it does not make any sense to discard 24 days of hearing when there is no prejudice to anyone in proceeding under section 103(2)(h) of the Act.

15. This is a unique situation. The member representative of employers, Board Member Wilson, died after the complainant completed its evidence. The respondents are ready to proceed. This is a clearly defined jurisdictional dispute between two trade unions. The findings of fact can be made under section 103(2)(h) and reported to the Board. After affording the parties an opportunity to present argument, this panel of the Board can then decide this complaint on the basis of the findings of fact reported by Vice-Chair Herman.

16. With regard to the motion for non-suit brought by the respondent IBEW, this can also be argued before this panel of the Board and decided by us on the basis of Vice-Chair Herman's report.

17. For the above reasons, the Board, pursuant to section 103(2)(h) of the Act, hereby authorizes Vice-Chair Herman to inquire into this jurisdictional dispute, to make findings of fact on the basis of the evidence which has been and will be adduced before him regarding this complaint, and to report to this panel with respect thereto.

18. This matter is referred to the Registrar.

**2115-87-G United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, Applicant v. Calorific Construction Limited, Respondent v. Millwright District Council, Intervener**

**Construction Industry Grievance - Practice and Procedure - Parties informally resolving work assignment disputes as they arose - Applicant union filing grievance one year later - Substantial prejudice to respondent flowing from delay - Application dismissed**

**BEFORE:** *S. A. Tacon*, Vice-Chair, and Board Members *D. G. Wozniak* and *E. G. Theobald*.

**APPEARANCES:** *Donald W. Wilson* for the applicant; *Mary Ellen Cummings* and *Peter Pryor* for the respondent; *N. L. Jesin* and *John Irvine* for the intervener.

**DECISION OF THE BOARD;** February 12, 1988

1. This is an application referring a grievance to arbitration pursuant to section 124 of the *Labour Relations Act*. The respondent, as a preliminary matter, objected to an adjudication of the merits of the grievance because of the delay involved in filing that complaint.

2. The Board heard evidence and submissions with respect to that preliminary motion and gave the following oral ruling.

The Board has considered the evidence and submissions of the parties with

respect to the respondent's preliminary objection and considers it appropriate to give an oral ruling. The Board notes, as well, that, in assessing the evidence, the Board has weighed the usual factors going to credibility of the witnesses and the documentary material. The Board's oral ruling will be set out in a written decision to be issued later and the Board reserves its right to make additional comments in that written decision as and if it considers appropriate to do so.

In the Board's view, it need not conclusively determine whether the decision in *Ontario Hydro*, [1987] OLRB Rep. Apr. 574 stands for the proposition that the time limits in the collective agreement are binding with respect to a section 124 application (as the applicant appeared to assert albeit in the context of his submission that the time limit should not be binding given the wording of section 124 in contrast to that of section 45(2)) or merely relevant and to be ignored at the applicant's peril (as the respondent contends). That need not be resolved here given that all parties agree that the issue really is one as to whether the Board should exercise its discretion in section 44(6) to hear the merits of the application.

The question of timeliness has been considered by the Board and by arbitrators in a number of cases over the years, including several cases cited by counsel. The Board considers it useful to refer to the following passage from *The Electrical Power Systems Construction Association*, [1987] OLRB Rep. Aug. 1079 as setting out the relevant factors in section 44(6) and the competing policy considerations:

12. ...The issue as to whether a section 89 complaint or grievance should be heard on the merits notwithstanding a delay in initiating the process is not new. The Board has a discretion in section 89 of the Act to refuse to entertain a complaint because of delay. That discretion is not exercised in a mechanical fashion but it is well recognized that labour relations policy reasons may militate against an adjudication of a complaint on the merits, rather than the delay merely going to the question of the appropriate remedy: *Sheller-Globe, supra*; *Corporation of the City of Mississauga, supra*. In the arbitral forum, as well, there is a statutory discretion in section 44(6) of the Act to relieve against time limits in a collective agreement provided there are reasonable grounds for the extension and the opposite party will not be substantially prejudiced thereby. The more recent arbitral jurisprudence focuses on a number of factors in determining whether the arbitrator's discretion should be exercised under section 44(6) including, the nature of the grievance, the length of the delay, the reason for the delay, the stage in the process at which the delay occurred, whether the grieving party was responsible for the delay or acted with due diligence and, of course, whether the opposite party would be prejudiced by an adjudication on the merits: *Re Greater Niagara General Hospital, supra*, including the cases cited therein; *Re Becker Milk Company, supra*. Again, the exercise is not mechanical but an assessment of the factors in the context of the specific circumstances of each grievance. It must also be emphasized that section 44(6) was enacted to enable arbitrators to resolve the actual grievance between the parties, to avoid the dismissal of a grievance solely on technical grounds. This statutory authority was predicated on the premise that the parties' collective bargaining relationship was better served by adjudication of the merits of disputes.

13. Section 124 of the Act provides an alternative route to arbitration for the construction industry. In hearing such grievances, the Board has the authority of an arbitration panel, including the discretion in section 44(6) of the Act to relieve against time limits. While the arbitral jurisprudence on the exercise of that discretion, therefore, is relevant, the Board must also be sensitive to the statutory purpose of section



124, namely, to provide an extraordinarily expeditious mechanism for adjudicating grievances in the construction industry: see, for example, *The Lummus Company*, *supra*. Not only may the grievance and arbitration process in the collective agreement be bypassed but, in accordance with section 124(2), the hearing shall be convened within fourteen days after receipt of the application.

In the instant case, the Board regards the evidence of P. Pryor and M. Griffiths, in particular, to have been given in a straightforward fashion and consistent with the documentary material. Griffiths, of course, was called as a witness by the applicant. Wherever the testimony of other witnesses conflicts with that of W. Weatherup (another witness of the applicant), the former is preferred. On the basis of the credible evidence before the Board, the Board finds that the work performed by the respondent was completed by some time in February 1987. In this regard, the Board also notes the testimony of J. Duhart, yet another of the applicant's witnesses, which supports the finding that the work performed by the respondent ended at that time.

The Board, then, must consider the section 44(6) issue in the context of work which ended in February, 1987 but about which a grievance was not filed until August, 1987. Moreover, it was the evidence of Duhart, W. Signal and Griffiths, taken together and all witnesses of the applicant, that the applicant's members were on site from "day one" with respect to the work in question *and* the matter of the work assignment was brought to the applicant's attention in August or early September 1986. This is *not* a case where the applicant had no knowledge of the matter being complained of; rather, the applicant was aware of the issue for virtually one year prior to the filing of the section 124 application in August 1987. Section 44(6) speaks of "reasonable grounds" and the absence of "substantial prejudice". To deal with the latter element first, the Board considers that there is substantial prejudice flowing from the delay. With respect to the respondent, the respondent would now face potential financial liability for work for which it has already paid members of the intervener to perform. Moreover, the passage of time of itself constitutes prejudice where the delay is unreasonable (see *Corporation of the City of Mississauga*, [1982] OLRB Rep. Mar. 420.). In the construction industry, in particular, the Board considers that a delay of roughly one year from the point where the issue first arose or of over six months if measured from the point the work ended in February, 1987 is unreasonable.

In reaching this conclusion, the Board has considered those factors set out in the passage already referred to dealing with "reasonable grounds". Here, the nature of the grievance - a work assignment dispute - is one in which speedy resolution is especially compelling. The length of the delay, as noted, is considerable whether measured from the start or finish of the work of the respondent. The applicant was solely responsible for that delay and the delay occurred prior to the launching of the grievance. The Board rejects the applicant's submissions that the respondent had actual notice of the likelihood of a grievance and that the delay in filing was merely "a technical irregularity" as unsupported by the evidence. Indeed, the thrust of the credible evidence (including that of some of the applicant's witnesses) was that there was not the intention to file a grievance nor communication that a grievance would follow. Rather, from August 1986 until January 1987, Griffi-

ths (for the applicant) succeeded in resolving work disputes, through negotiation, to his satisfaction. When Weatherup became involved, more disputes were resolved. Whether Weatherup was not satisfied with the result is irrelevant in that the evidence does not ground a finding that the respondent was put on notice that a grievance would be forthcoming. Nor can it be said even Weatherup acted with "due diligence" in filing the grievance. The Board does not accept his testimony that he was "investigating" the work assignment throughout the period from January or February, 1987 (when he resumed his duties as business agent) to August, 1987 when the grievance was filed.

In the Board's view, the real reason for the delay, was a rethinking over that period of the applicant's position with respect to robotics and the applicant's final conclusion that it wanted to challenge the entire work assignment to settle this type of work in general. Weatherup's comments in this regard are most revealing where he stated that, while robotics had been around for four or five years and the work had been performed by different crafts, it was a controversial problem on which the Board had not yet reached a determination. Weatherup stated that he thought the robotics issue should be decided by the Board, that this issue would come to the Board as a jurisdictional dispute and that he introduced the section 124 application to trigger a jurisdictional dispute (by implication, from the respondent or intervener). The Board does not regard this strategy as constituting an acceptable "reason for the delay" involved.

Thus, consideration of all the factors referred to in the *EPSCA* case, *supra*, in the context of the standard in section 44(6) (i.e., "reasonable grounds" for the delay and the absence of "substantial prejudice" to the other parties) all point to a decision to refuse to extend the time limits in the instant case.

The Board notes briefly that the applicant's argument that the respondent waived its right to raise a timeliness objection is without merit. No "fresh step" was taken to handle the grievance and the applicant had ample notice from before the matter actually came on for hearing that the respondent intended to raise such a preliminary objection.

Nor does the Board accept the notion that refusing to hear the merits will send a signal to trade unions that informal discussions to resolve a dispute might prejudice the trade union's legal right to grieve or that grievances will be needlessly precipitated. The Board has always been sensitive to and encouraged discussions by parties to resolve disputes both before and after the filing of grievances. That is not this case. Here, the applicant repeatedly raised work assignment questions and those were discussed and resolved. The applicant will not be permitted to lull the other parties into believing that any problems have been raised and satisfactorily dealt with and, then, once the work is finally completed, file a grievance contesting all work which was not given to the applicant as a result of those discussions. Again, without reiterating the point at length, the evidence does not establish that the respondent was put on notice (actual or formal) that a grievance would be forthcoming until August, 1987.

Thus, for all of the foregoing reasons, and having considered section 44(6) in the context of the statutory purpose of section 124, the Board considers that a weighing of the competing policy considerations leads to the Board's conclusion that the Board should decline to exercise its discretion under section 44(6) of the Act to extend the time limit provided in the collective agreement. There was no dispute that the time limit provided in the collective agreement (Article 17) had long since passed.

Accordingly, the respondent's preliminary objection is upheld and the application is dismissed.

3. In accordance with the above, this application is hereby dismissed.
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### **1952-87-R Canadian Brotherhood of Railway, Transport and General Workers, Applicant v. Chateau Laurier Hotel, Respondent**

**Bargaining Unit - Certification - Proposed unit of banquet facilities department - Applicant requesting the exclusion of part-time employees and students - Board departing from usual practice of placing full and part-time employees in separate units at the request of either party - No separate community of interest - Practice of hotels in city of treating such employees as a single group**

**BEFORE:** *Robert D. Howe*, Vice-Chair, and Board Members *W. H. Wightman* and *R. R. Montague*.

**APPEARANCES:** *Gary Caroline* and *Rick Beckwith* for the applicant; *Stewart Saxe*, *David Turner* and *Francine Sauriol* for the respondent.

#### **DECISION OF THE BOARD;** February 10, 1988

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. As indicated in paragraph 3 of the (Form 1) Application for Certification which the applicant filed with the Board on October 16, 1987, the unit of employees of the respondent that the applicant initially claimed to be appropriate for collective bargaining was "all employees of the banquet facilities department of the respondent, save and except banquet manager, maitre d'hotel, assistant maitre d'hotel, bar manager, catering manager and assistant catering managers". In paragraph 4 of the Application, the applicant indicated that there were approximately 38 employees in that unit. In paragraph 5 of its (Form 10) Reply, the respondent accepted that unit as being appropriate for collective bargaining with only one change (the pluralisation of "banquet manager"). However, paragraph 4 of the Reply indicated that there were 167 employees in the unit as of the date the application was made. The primary reason for that significant difference is that the respondent's list includes as employees a large number of persons whom the applicant contends are employees of an employment agency and not of the respondent.



4. The application was scheduled for hearing on November 13, 1987 before another panel of the Board. Prior to that hearing, the parties met with a Board Officer to review the respondent's list of employees, and to attempt to resolve or narrow the issues in dispute between them. After reviewing the list, the applicant sought to revise its proposed bargaining unit description so as to exclude "persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". The respondent did not object to the timing of the applicant's change in position, but did assert that the proposed exclusions were inappropriate in the circumstances of this case.

5. By letter dated November 26, 1987, the Registrar advised the parties as follows:

After reviewing with the parties their proposed departmental unit as opposed to a tag-end unit, and the exclusion of part-time employees, the Board has directed me to advise you that there is to be an exchange of pleadings.

More particularly, each of the parties shall deliver to the Board, within 15 days from receipt of this letter, a statement of the material facts on which it relies in connection with the exclusion of persons regularly employed for not more than 24 hours per week and students employed during the school vacation period from the bargaining unit, which is opposed by the respondent.

6. The application was subsequently listed for hearing before the present panel on January 22, 1988. Prior to that hearing, the parties met again with a Board Officer. The Board Officer's report (signed by the parties' respective counsel) regarding that meeting indicates that in addition to the aforementioned dispute concerning the bargaining unit description, there are two other matters in dispute between the parties. Appendix "A" to the report describes those two matters as follows:

- 1) The Applicant takes the position that all persons on schedule "D" are *not* employees of the Respondent, except #5, 12, 21, 33, 37, 40, 41, 42, 44, 48, 55, 56, 57, 61, 63, 70, 76, 85, 92, 116, 117, 119, 121, 127, 130, 138.

The Respondent takes the position that all employees on schedule "D" are employees of the Respondent.

- 2) The Respondent takes the position that the Board should not apply the 30/30 rule. The Respondent takes the position that all employees who maintain an employee relationship should be on the list for the count.

The Applicant takes the position that in accordance with its usual practice the Board should apply the 30/30 rule.

7. After meeting with the Board Officer, counsel appeared before this panel of the Board and agreed to argue the bargaining unit description issue on the basis of the following facts:

1. The Respondent operates a large hotel in Ottawa employing in excess of 550 persons.
2. Banquet employees are employed on an "on-call" basis. In other words they are called in when needed and may either accept or reject the call without consequence. For many the "call" is made by a posting put up in the Hotel on Friday for the week commencing that Sunday; others are actually telephoned. The different treatment is based on whether they are scheduled to be in and will see the posting.

3. The Hotel's need for banquet employees varies greatly from day to day, week to week and month to month.
4. At any time the division of employees along the Board's traditional 24 hour rule will reflect
  - who happened to be called that week(s)
  - who happened to be available that week(s)
  - the particular business pattern at the time,
 though the Hotel does give some consideration to length of service when scheduling.
5. The actual work performed by part-time ("P.T.") personnel is the same as by full-time ("F.T.").
6. The reporting structure and call in structure does not differ on P.T./F.T. basis and does differ from other employees.
7. The wages and benefits of banquet employees do not differ on P.T./F.T. basis and do differ from other employees.
8. The working conditions do not differ on a P.T./F.T. basis and do differ from other employees.
9. Banquet employees do not owe an employer-employee type allegiance to a particular hotel in the same manner as regular non-banquet employees. This is a result of working for many different employers in the Industry.
10. This unique feature of banquet employees to work for many employers - it could be 4 in a week - is shared by all banquet employees whether or not they happen to work for one hotel a lot in a particular month, although this is impacted somewhat by the seniority component of the scheduling decision.
11. Many of the banquet employees covered by this application likely have membership in the Hotel, Club and Restaurant Employees Union Local in Ottawa as they will work in other Ottawa hotels requiring such membership. This will be true of both F.T. and P.T. employees and will be very different from other employees in the Hotel.
12. The practice in other Ottawa area hotels is to consider banquet employees as a single group treated differently regarding wages, benefits and working conditions from the regular F.T. and P.T. bargaining unit employees.
13. This practice in the Industry to treat banquet employees as a single separate group undistinguished along F.T. and P.T. lines is also reflected in Toronto hotel Collective Agreements and practices.

Points 1 to 8 inclusive are agreed facts for the purpose of determining the appropriate bargaining unit. The parties are also in agreement regarding points 9 and 10, subject to the proviso that those two points are less applicable to employees who regularly work in the area of forty hours per week for the respondent. The only information before the Board regarding the number of such employees is counsel for the respondent's acknowledgment that there may be two or three of them. Counsel for the applicant advised the Board that the applicant has no knowledge of the information contained in points 11, 12, and 13, but that in the interests of expediting the matter, the applicant is prepared to have the Board treat those points as undisputed facts for the purposes of determining the appropriate bargaining unit.

8. In *Toronto Airport Hilton*, [1980] OLRB Rep. Sept. 1330, the Board wrote as follows concerning its general practice of placing full-time and part-time employees in separate bargaining units at the request of either a trade union or an employer (or both):

6. The Board's general practice concerning exclusion of part-time employees and students from full-time bargaining units is set forth in *Inter-City Bandag (Ontario) Limited*, [1980] OLRB Rep. Mar. 324. (See also *The Post Printing Company Ltd.*, a division of *Thomson Newspapers Limited (Leamington)*, [1966] OLRB Rep. Mar. 930; *Premier Plastics Limited*, [1969] OLRB Rep. July 508; *Wilson-Munroe Company Ltd.*, [1973] OLRB Rep. Dec. 647; and *The Beacon Herald of Stratford Limited*, [1975] OLRB Rep. Feb. 103.) This practice reflects the Board's view, supported by the extensive labour relations experience and knowledge of its members, that part-time employees and students, on the one hand, and full-time employees, on the other hand, do not generally share a community of interest since the former are primarily concerned with maintaining a convenient work schedule which permits them to accommodate the other important aspects of their lives with their work and with obtaining short-term immediate improvements in remuneration rather than with obtaining life insurance, pension, disability, and other benefit plans; extensive seniority clauses; and other long-term benefits. See, for example, *Leon's Furniture Limited*, [1976] OLRB Rep. May 232, paragraph 5, in which the Board stated:

"... we have learned through experience in such applications that part-time employees do not share a community of interest with full-time employees in many aspects of the collective bargaining scenario. More precisely part-time employees are more pragmatically concerned with immediate as opposed to long-term benefits with respect to improving their terms and conditions of employment. In applying this proposition to more practical issues the part-time employee usually prefers to sacrifice long-term pension, medical and other welfare benefits for a more substantial increase in wages or a longer vacation period. The nature of seniority provisions contained in a collective agreement with respect to promotions, transfer and lay-offs does not always assume the same degree of significance to the part-time employee as it would to the full-time employee. In other words, the Board had discerned a natural, inevitable schism in measuring the community of interest between the two categories of employees that invite separation into peculiar bargaining units ..."

7. For the foregoing reasons, part-time employees and students generally tend to have less initial interest in collective bargaining. Moreover, since the union organizing campaign may give rise to considerable uncertainty and apprehension among part-time employees and students with respect to the continued accommodation of their particular needs and desires for a convenient work schedule and maximum short-term remuneration, they are prone to oppose applications for certification. Such opposition could preclude full-time employees from engaging in collective bargaining if the Board generally exercised its discretion under section 6(1) of the Act in favour of bargaining units which included not only full-time employees but also part-time employees and students. Accordingly, the Board's practice concerning part-time employees and students is not only a policy designed to avoid difficulties which may arise where groups with separate communities of interest are included in a single bargaining unit, but is also an organizing rule which promotes the public interest, identified in the preamble of *The Labour Relations Act*, in furthering harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees.



9. In *Board of Education for the Borough of Scarborough*, [1980] OLRB Rep. Dec. 1713, after quoting with approval the preceding passage from *Toronto Airport Hilton*, the Board stated:

12. We are of the view that the case before us presents much less compelling evidence for the requested inclusion of the so-called permanent part-time employees than existed in the *Toronto Airport Hilton* case. The employees in question work precisely one-half the hours of full-time employees and this fact is usually the critical advantage flowing to those employees attracted to part-time work. It is this reality that allows them to accommodate the other important aspects of their lives in a much more substantial way than full-time employment allows. For example, a 1976 study revealed that key reasons given for working part-time included: "going to school", "personal or family responsibilities" and "not wanting to work 'full-time'." See Robertson, *Part-time Work in Ontario: 1966 to 1976*, Research Branch, Ontario Ministry of Labour, August 1976, Study No. 20, page 18. The fact that part-time employees perform the same work under the same conditions as full-time employees and the fact that their terms and conditions of employment are similar are not unusual facts in pre-collective bargaining employment patterns and pale in comparison to respective attachments to the work place of full and part-time employees. As the panel in *Toronto Airport Hilton* case, *supra*, indicated, it is this Board's experience that part-time employees have less initial interest in collective bargaining than do full-time employees because of the aforementioned attraction of part-time work. Indeed, it is our opinion that collective bargaining would have been impeded for entire industries had this Board taken any other view. It is unconstructive to point to situations where parties are now providing for part-time and full-time employees in one collective agreement (and even here many qualifications have to be inserted). This is the end result of collective bargaining, after a relationship has matured and after the parties have come to an understanding over the proper balance of full-time to part-time work. In fact, without such an understanding, full-time and part-time employees may come into dramatic opposition should an employer decide to rely more heavily on part-time employees for reasons of economy and/or administrative efficiency. Finally, it is important to stress that none of the above deprives part-time employees of collective bargaining. Our approach responds only to the appropriateness of any bargaining unit where a party asks the Board to require their inclusion with regular full-time employees.

13. In the facts at hand the respondent points to the common terms of employment as evidence of a community justifying one bargaining unit. As noted above, these factors do not go to the different appetites for collective bargaining exhibited by these two distinct groups of employees regardless of industry. Moreover, such factors are often the product of unilateral employer action and, thus, unreliable indicators of employee interests. There is no indication that the respondent provided similar conditions of employment in response to employee demands or marketplace pressures. The interchange between full-time and part-time employment in evidence before us is also not unusual and is a phenomenon that can be accommodated by the collective bargaining process. This is not a case where there is no identifiable group of employees hired to work part-time as in *Paris Poultry Products Limited*, [1978] OLRB Rep. May 453; *Canadian Pacific Railway Company*, *Royal York Hotel Case*, [1960] OLRB Rep. May 1960; and in the construction industry.

10. The Board will not lightly depart from that well-established practice, which is underpinned by sound labour relations policy considerations. However, as noted in *Leon's Furniture Limited*, *supra*, at paragraph 5, the Board must not "exercise 'tunnel vision' with respect to determining questions of appropriateness generally and the exclusion of part-time employees particularly." In the circumstances of the instant case, we are persuaded that the exclusion of "persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period" is not warranted.

11. As contended by respondent's counsel, it is clear from the facts set forth above that the persons who would be considered to be part-time employees under the Board's usual approach (of considering the number of hours worked in each week of the seven-week period preceding the application) do not have a separate community of interest from those who would be considered to be full-time under that approach. They perform the same work for the respondent, under the same working conditions, for the same wages and benefits. The respondent's practice in that regard is

not merely the product of unilateral employer action. It reflects the practice of other hotels in the Ottawa area, where the practice is to consider banquet employees as a single group treated differently regarding wages, benefits, and working conditions, than the regular full-time and part-time bargaining unit employees who work in other departments. All of the respondent's banquet department employees are employed on an "on-call" basis, and may accept or reject any call without consequence. Thus, they are all in a position to accommodate their working hours with the other important aspects of their lives. Moreover, with the possible exception of two or three persons who may be regularly scheduled to work approximately forty hours per week, the hours, if any, worked in a particular week by a particular employee will reflect who happened to be called that week (in which determination seniority is given some consideration), who happened to be available that week, and the particular business pattern, which varies greatly from day to day, week to week, and month to month. The agreed facts do not point to two relatively distinct groups of employees, separated on the basis of their respective attachments to the work place and their respective number of hours generally worked for the respondent on a weekly basis. Rather, the facts point to a single, relatively amorphous group of employees who share a community of interest based upon common terms and conditions of employment, highly variable hours of work, great flexibility in accepting or rejecting "calls", and a relatively limited allegiance to the respondent.

12. As noted above, the Board's practice concerning part-time employees (and students) is also an organizing rule which reflects the different appetites for collective bargaining often exhibited by full-time employees on the one hand, and part-time employees on the other. However, in the instant case the facts support the respondent's contention that its banquet department employees are not divided into two such groups, but rather form a single, relatively amorphous group. Moreover, it is clear that the applicant did not rely upon that rule in seeking to organize the respondent's employees. It initially applied for a bargaining unit composed of all of the respondent's (non-managerial) banquet department employees, without an exclusion of part-time employees and students. Those exclusions were requested only after the applicant reviewed the respondent's list.

13. For the foregoing reasons, the Board is satisfied that the rationale which generally warrants the exclusion of part-time employees (and students) at the request of either the applicant or the respondent is, on the basis of the facts set forth above, inapplicable in the instant case. Having regard to that conclusion and to the agreement of the parties concerning the other aspects of the bargaining unit description, the Board, in the exercise of its discretion under section 6(1) of the *Labour Relations Act*, hereby finds that all employees of the banquet facilities department of the respondent in the City of Ottawa, save and except assistant maitre d'hotel, the bar supervisor, and persons above the rank of assistant maitre d'hotel or bar supervisor, constitute a unit of employees of the respondent appropriate for collective bargaining.

14. The Registrar is directed to list this matter for hearing, for the purpose of hearing the evidence and submissions of the parties with respect to the respondent's contention that the Board should not apply the "30/30 rule", the applicant's contention that persons obtained by the respondent through an employment agency are not employees of the respondent, and all other outstanding matters arising out and incidental to this application.

15. This panel of the Board is not seized of this application.

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**0554-83-U; 0723-86-U** United Brotherhood of Carpenters and Joiners of America, Local 1190, Complainant v. Labourers' International Union of North America, Local 183 and Those Companies Listed on Schedule "A" attached to the complaint, Respondents; Local 27, United Brotherhood of Carpenters and Joiners of America on its own behalf and on behalf of all of its members, Complainant v. Local 183, Labourers' International Union of North America, Michael Reilly, and Dellbrook Homes, Respondents

**Practice and Procedure - Unfair Labour Practice - Complaint that respondent union negotiated collective agreements which contained subcontracting clauses requiring home builders to subcontract work to contractors in contractual relations with respondent union notwithstanding that the union did not represent any of the employees employed by the home builders - Board declining to inquire into complaint due to delay in bringing matter on for hearing**

**BEFORE:** Robert D. Howe, Vice-Chair, and Board Members J. A. Ronson and P. V. Grasso.

**APPEARANCES:** Douglas J. Wray, D. A. McKee, F. R. Rimes, T. Iannuzzi and F. D'Abbondanza for the complainants; C. M. Mitchell and C. Detoni for the Labourers' International Union of North America, Local 183 and Michael Reilly; Joseph Liberman for the Toronto Housing Labour Bureau and all of the other respondents in File No. 0554-83-U; Paul Young for Dellbrook Homes.

**DECISION OF THE BOARD;** February 2, 1988

1. File No. 0554-83-U is a complaint under section 89 of the *Labour Relations Act* in which Local 1190 of the United Brotherhood of Carpenters and Joiners of America ("Local 1190") alleges that it has been dealt with contrary to sections 48, 64, 66, 67, and 70 of the Act by Labourers' International Union of North America, Local 183 (also referred to in this decision as "Local 183" and as the "Labourers"), the Toronto Housing Labour Bureau (the "Bureau"), and the other respondents listed on Schedule "A" to that complaint. (For ease of exposition, that complaint will be referred to in this decision as the "Bureau complaint".)
2. File No. 0723-86-U is a section 89 complaint in which Local 27 of the United Brotherhood of Carpenters and Joiners of America ("Local 27") alleges that it has been dealt with contrary to sections 3, 64, 66, 67(2), and 70 of the Act by Local 183, Michael Reilly, and Dellbrook Homes ("Dellbrook"). (For ease of exposition, that complaint will be referred to in this decision as the "Dellbrook complaint".)
3. In an unreported decision dated April 28, 1986 in an application under section 62 of the Act (File No. 1433-85-R), another panel of the Board declared that Local 27 had acquired the rights, privileges, and duties of its predecessor, Local 1190, by reason of a merger, amalgamation, or transfer of jurisdiction. (For ease of exposition, Local 1190 and its successor, Local 27, will also be referred to compendiously in this decision as the "Carpenters".)
4. The essence of the Bureau complaint is that Local 183 has (in the words of counsel for the Carpenters) "organized from the top down" by negotiating, with various home builders, collective agreements which contain subcontracting clauses which require them to subcontract carpentry work only to carpentry contractors who are in contractual relations with Local 183, notwithstanding that the home builders do not normally employ carpenters and that Local 183 does not represent any carpenters employed by the home builders. In addition to compensation, the relief requested by the Carpenters includes a declaration that the collective agreements in question are



null and void or, alternatively, a declaration that the subcontracting clauses in the collective agreements are null and void. It is common ground among the parties that the Dellbrook complaint raises similar issues.

5. Counsel for the Labourers submits that the Board, in the exercise of its discretion under section 89(4) of the Act, should dismiss these two complaints on the basis of delay and abuse of process. Dismissal is also advocated by counsel for Dellbrook, and by counsel for the Bureau and the other respondents listed in Schedule "A" to the Bureau complaint. Counsel for the Carpenters, on the other hand, contends that there has been no delay or abuse of process by the Carpenters, and submits that the complaints should be heard on their merits.

6. None of the parties called any witnesses before this panel of the Board. However, we received thirty-nine exhibits on the agreement of the parties, and admitted a further exhibit at the request of Carpenters' counsel, after overruling an objection to its admissibility by counsel for the other parties. Almost all of that documentation was also placed before a panel chaired by Vice-Chair Kuttner (the "Kuttner panel") in File No. 1445-85-U (the "Presidential complaint"), another section 89 complaint filed by the Carpenters against the Labourers. The background to these complaints, and the pertinent events which occurred prior to September of 1987, are set forth as follows in that panel's decision (the "Presidential decision") dated September 14, 1987 in respect of that matter (*Toronto Housing Labour Bureau*, [1987] OLRB Rep. Sept. 1178):

3. ... Since 1981, the parties have been involved in a bitter dispute, each seeking to assert hegemony over the work of framing carpentry in the residential housing sector of the construction industry. It is a dispute at its root representational in nature as each has sought to gain exclusive bargaining rights for the employees of the many building contractors engaged in residential framing work - a sector largely unorganized prior to this decade. It is a dispute characterized by great acrimony and recrimination. It is a dispute many of the battles of which have been, are in the process of being, or will in the future be, fought in hearing rooms before this Board. It is a dispute characterized by two recurring themes: a relentless attack by Local 183 on bargaining rights earlier asserted by Local 27, or its predecessor United Brotherhood of Carpenters and Joiners of America Local 1190 ("Local 1190"); and a bitter counterattack by Local 27 of the linchpin of Local 183's drive to dominate residential framing - the subcontracting clause it has successfully negotiated with employers, builders, developers and owners, the effect of which has been to squeeze out of framing work those contractors whose employees are represented by Local 27.
4. The saga begins in the summer of 1981 with the filing of a great number of competing applications for certification by both locals seeking bargaining rights for the employees of a variety of contractors engaged in framing carpentry within the residential sector. These various applications were consolidated and put down to be heard together in a single proceeding which, by convention before us, the parties have referred to as the Montemar certification proceedings. Hearings were extremely drawn out and extended from the summer of 1981 to that of 1983 at which time Local 1190 withdrew, both as applicant in their own applications for certification and as intervener in those filed by Local 183. But much had occurred in the interim. The Montemar certification proceedings were dominated by a host of allegations made by Local 183 of misconduct on the part of both the respondent employers and Local 1190 whether as applicant or as intervener. These reached their apogee with the filing in May 1983 of a section 89 complaint of unfair labour practice filed by Local 183 against Local 1190 and sundry other parties (Board File 0320-83-U) alleging breaches of sections 13, 48 and 64 of the Act, the particulars of which were drawn from evidence adduced in the Montemar certification proceedings. In addition, Local 183 sought the rescission and revocation by the Board of all certificates granted to Local 1190 within the residential sector of the housing industry from June 1981 to that date. Some 70 certificates were so impugned.

5. Faced with that onslaught, Local 1190 was quick to retaliate, and on June 15, 1983 filed its counter-complaint [the Bureau complaint] under section 89 of the Act against Local 183 and the employers and employer associations with which it had a bargaining relationship governing framing carpentry within the residential sector, asserting breach of sections 48, 64, 66, 67 and 70 of the Act (Board File 0554-83-U). Now, although it was there alleged that Local 183 had, in certain circumstances, entered into collective agreements without first establishing as a foundation, bargaining rights for the employees affected as required by the Act, such allegation was desultory at best.... The focal point of Local 1190's complaint was something quite different - namely, the subcontracting clause found as a principal feature in each of the collective agreements which Local 183 had entered into with the various employers and employer organizations engaged in carpentry framing work within the residential sector, the effect of which was to limit such work to those contractors having a bargaining relationship with Local 183. The relief sought was that the collective agreements referred to be declared null and void or, alternatively, that the subcontracting clauses therein contained be so declared and so to be of no force and effect. Thus, in response to the attack on the integrity of its bargaining relationships premised on a failure on its part to hold bargaining rights for the employees of those employers with whom it claimed a bargaining relationship, Local 1190 likewise attacked the integrity of the bargaining rights asserted by Local 183, but by impugning the validity of the subcontracting clauses through which it had aggrandized for itself an ever-expanding share of framing carpentry work in the residential sector.
  
6. Meanwhile, hearings in the Montemar certificate proceedings were ongoing before a panel chaired by Vice-Chair Furness and these were scheduled for continuation on June 23, 1983. Counsel for Local 183 had sought the consolidation of its section 89 complaint (Board File [0320-83-U]) with those proceedings and although the Board has acceded to that request, it was determined on that date to consider the two matters *seriatim* particularly in light of the fact that the section 89 complaint had only been filed well after the certification proceedings had been underway. A further complication was the ongoing strike called by Local 1190 against the contractors for [whose] employees it held bargaining rights, a strike which Local 183 asserted was called in collusion with those contractors in order to undermine its organizational drive within the sector. In point of fact, the certification proceedings, which it had been thought would extend well into 1984, were unexpectedly brought to a close by the earlier noted withdrawal by Local 1190 in November 1983 of its own applications for certification and its interventions in those of Local 183. That turn of events resulted in the grant of further certificates to Local 183 with respect to a large number of contractors. The Furness panel never did commence hearings in the section 89 complaint filed by Local 183 because of an accommodation reached between it and Local 1190 and to which we now turn.
  
7. Hearings in [the Bureau complaint] were scheduled to commence in early June 1983 before a panel of the Board chaired by Vice-Chair Burkett. In a preliminary ruling later reduced to writing (unreported, July 11, 1983) that panel of the Board rejected the preliminary motion made by Local 183 that the complaint be dismissed for failure to make out a *prima facie* case. That ruling was in the following terms:

#### *Oral Ruling*

We are not prepared to dismiss this complaint, which alleges in part that the no employer support provisions of section 48 of the Act have been breached and further, that the entering into of the subcontracting clause at issue was designed to interfere with the organizing, certification and collective bargaining of the complaint trade union, on the grounds that there is no *prima facie* complaint made out. Where it is alleged, as in this case, that the respondent Labourers' International Union of North America, Local 183, as bargaining agent for a number of residential home builders (who do not directly employ carpenters) has entered into a collective agreement with the builders that provide a preference in the subcontracting of carpentry work to carpenter contractors who are in contractual relations with the Labourers' Union, at a time when there is ongoing competition between the Labourers' Union and the Car-

penters' Union in respect of the bargaining rights of carpenters and carpenters' apprentices employed in residential home building by these carpenter contractors, we are not prepared to find that there is no *prima facie* case made out.

This matter will be decided by the Board after the parties have called their evidence and the Board has the benefit of full argument. Having said this we acknowledge that on its face, other than for the fact that the union on whose behalf the subcontracting clause operated in *The Metropolitan Toronto Apartment Builders Association*, [1978] OLRB Rep. Nov. 1022 case had a craft claim to the work, this complaint is difficult to distinguish from *The Metropolitan Toronto Apartment Builders Association* case *supra* and therefore, in the end the Board may be called upon to either reaffirm, modify or overrule it.

We are satisfied that the complainant, as a union with craft jurisdiction over carpentry work, as a union attempting to organize carpenters of carpentry contractors operating in the residential home building sector, and as a union holding bargaining rights in respect of the carpenters employed by a large number of such contractors has status to bring this complaint.

Given the surrounding circumstances we are not prepared to find that the complaint, or any part of it is untimely and, therefore, should not be heard. However, the delay in responding to the events complained of in paragraphs 1, 2 and 3 of Schedule B may affect remedy.

This is a matter in which the complainant will proceed first. The Board will entertain submissions at the conclusion of the case as to where the legal burden falls.

8. ... The proceedings proper commenced with the calling by Local 1190 of its principal witness, Mr. Weller, who testified, *inter alia*, to the extent of the bargaining rights held by Local 1190 in the residential home building sector. It is to be recalled that Local 183 had earlier in the Montemar certification proceedings and in its own section 89 complaint, already filed but not yet heard, sought to attack the validity of those bargaining rights. In the section 89 complaint proceedings before the Burkett panel, Local 183 continued with that offensive, but now raising the same issue as a defence to the allegations made against it. The Burkett panel ruled that such was a valid defence and could be pursued by way of cross-examination of Mr. Weller. However, Local 183 could do so effectively only on observance by Mr. Weller of the provisions of a subpoena *duces tecum* which Local 183 had only succeeded in serving on him on the date set for its cross-examination of the witness. Compliance with the ruling of the Board to that effect, reached only after lengthy wrangling between the parties, could only be obtained by the grant of an adjournment, and such was given.
9. The case was scheduled for further hearing in mid-November, 1983 but those continuation proceedings never took place. It is to be recalled that at that time Local 1190 withdrew from the Montemar certification proceedings, and fast on the heels of that development, the two locals reached an accommodation regarding the respective section 89 proceedings each had filed against the other. By letters dated November 15, 1983 counsel for each advised the Board of their agreement to adjourn Board Files 0320-83-U and 0554-83-U [the Bureau complaint] *sine die*. The Board, in accordance with its normal practice granted the adjournments sought on November 18, 1983 on the following terms:

Having regard to the agreement of the parties, the Board hereby consents to adjourn this complaint *sine die*, for a period not exceeding one year. Unless within that time, the parties request that the Board proceed with the matter, it will be terminated.

Insofar as [the Bureau complaint] was concerned, there matters lay dormant for close to a year, when, on November 8, 1984 Local 1190 requested, by letter addressed to the Registrar of the Board that there be a resumption of hearings in its section 89 complaint. That request was never acknowledged by the Board, nor did it list the



matter for continuation of hearing. We return to that complaint later in this recitation of events.

10. Now, although there was a moratorium on the section 89 complaint front, no general cease fire had been declared in the war for ascendancy in carpentry framework within the residential sector, and indeed the struggle went on unabated. The terrain however changed, as the parties moved from the simple filing of complaints under section 89 of the Act to a more varied strategy, with Local 183 seeking to enforce its no subcontracting clauses to the exclusion of Local 1190 by the referral to arbitration under section 124 of grievances for alleged breaches thereof. This was often coupled with the simultaneous filing of applications seeking relief under the provisions of section 1(4) of the Act and further complaints under the provisions of section 89. Local 1190 was as active in the pursuit of its objectives seeking recourse in those same provisions of the Act and as well in the self-contained 'code' governing the resolution of jurisdictional disputes as contained in section 91 of the Act. The number of applications and counter-applications filed pursuant to these various provisions of the Act over the next several years is quite formidable. Many were settled, withdrawn, or simply not proceeded with. Others were more vigorously prosecuted and these we highlight here. It is important to recognize that underlying all of these proceedings was a common objective and unifying theme - the assault of the integrity of the bargaining relationships each of the protagonists was attempting to maintain and expand. Of particular relevance for our purposes was the continual and unabated assault by Local 1190 on Local 183's principal instrument for solidifying its position within the residential framework sector - the subcontracting clause as found within its collective agreements. Like a recurring refrain, Local 1190 sought in its many applications a declaration that either the underlying collective agreement, or at least the no subcontracting clauses therein contained should be declared invalid, void and of no effect. We turn to the principal applications filed.
11. In March, 1984 Local 1190 filed two related applications, a section 1(4) against three contractors, *Attica Investment Inc.*, *T/A Fairbank Carpentry*, and *E. & R. Carpentry Inc.*, (Board File 2984-83-R); and a section 89 complaint against Local 183 (Board File 2985-83-U). The section 1(4) matter was settled to the satisfaction of all parties concerned, and the section 89 complaint withdrawn by Local 1190. Now although Local 1190 there did not directly attack the subcontracting clauses found in the Local 183 collective agreements, both *Attica* and *E. & R. Carpentry* filed replies seeking the same declaration of nullity which we have seen in earlier Local 1190 applications. As noted, however, these matters were resolved directly between the parties. This preliminary skirmish was followed by a series of more hotly contested applications commencing in the summer of 1984.
12. First of these was the filing by Local 183 of a Referral of Grievance to Arbitration under section 124 of the Act alleging breach by a contractor, Lakeview Estates of the no-subcontracting clause to which it was bound as a result of a so-called 'pickup' agreement between it and Local 183 whereby the terms of the collective agreement between the Local and the Toronto Housing Labour Bureau became binding upon it (Board File 0985-84-M). Five days subsequent to the filing of that referral, Local 183 filed an application under the provisions of subsection 1(4) of the Act in respect of two contractors which it alleged were carrying on associated or related activities so as to constitute a single employer within the meaning of the statute - *Montemar Construction Ltd.*, and *Trimar Carpentry* (Board File 1023-84-R). We are familiar with Montemar from the earlier certification proceedings and indeed Local 183 had been certified as bargaining agent for its employees engaged in frame carpentry work by Board certificate dated November 1, 1983 (Board File 0746-81-R). Trimar was engaged as the framing carpentry subcontractor on the Lakeview site. (The Lakeview and Trimar matters, although dealt with separately by the Board, were in fact interrelated in the history of the two sets of proceedings.) In October, 1984 Local 183 filed a section 89 complaint against Local 1190, Trimar and Montemar (Board File 1736-84-U). That complaint and the section 1(4) application (Board File 1023-84-R) were consolidated and listed for hearing in January 1985 and at that time the Board directed that it would deal first with the question of the status of Local 1190 to inter-

vene in the section 1(4) proceedings as a preliminary matter and entertained evidence in that regard. Since then (and subsequent to the hearings in the instant case), the Board has varied that direction by decision dated March 24, 1987 and directed that both the section 1(4) application and the section 89 complaint be set down for hearing on the merits.

13. Hearings in the section 124 grievance proceedings against *Lakeview Estates*, (Board File 0985-84-M) were adjourned after the Board ruled that Local 1190, which had appeared at the proceedings had established a *prima facie* case that the grievance involved a dispute over the assignment of work which ought more properly to be dealt with under the jurisdictional dispute provisions under the Act. Local 1190, which claims bargaining rights for the employees of Trimar, subsequently filed a complaint under section 91 of the Act (Board File 1201-84-J) and hearings in that matter were held in the fall of 1984 concurrently with the proceedings in Board Files 1023-84-R and 1736-84-U before panels of the Board differently constituted but both chaired by Vice-Chair Satterfield. Local 183 argued vigorously in the section 91 proceedings as a preliminary matter that the Board ought to refuse to entertain the complaint [on the basis of] it being an abuse of its process in light of the identical nature of the allegations made therein and in the section 89 complaint filed by Local 1190 against Local 183 that had been adjourned almost one year earlier [the Bureau complaint]. The Board reserved on that preliminary motion, finally argued in January 1985, but has since the hearing of the instant case issued a decision declining to exercise its discretion to refuse to entertain the section 91 complaint as sought by Local 183 and directed that the matter be relisted for hearing (decision dated April 13, 1987, Board File 1201-84-JD). The matter has since been set down to be heard by a panel of the Board differently constituted on October 7 and 8, 1987.
14. Meanwhile, Local 183's defensive actions against what it perceived as intrusions by Local 1190 into the residential framing sector continued unabated. Various other section 124 referrals were filed against *Lakeview Estates*, the thrust and intent of which was similar to that first filed in Board File 0985-84-M which had prompted the section 91 complaint by Local 1190. In December 1984 those multiple grievance proceedings by Local 183 against *Lakeview Estates* were settled (Board Files 0985-84-M, 1504-84-M and 2386-84-M). Nor was Local 1190 inactive. In October 1984 it filed a section 89 complaint against Local 183 and two contractors, *Karl Thier Construction Ltd.* and *Penka Carpentry Ltd.*, (Board File 2006-84-U) and a related section 1(4) application against the two contractors (Board File 2133-84-R). Local 1190 holds bargaining rights for Karl Thier and, in fact, the matter was settled to its satisfaction and the complaint against Local 183 withdrawn. That occurred in early December 1984 at approximately the same time that Local 183 had settled ... several section 124 grievance referrals with *Lakeview Estates*. It is to be recalled that Local 1190 had sought status at those proceedings as well, and indeed at the time of the settling of these matters between the principal parties, Local 1190 advised Local 183 that it intended to file a further section 89 complaint against it on terms substantively identical to those in [the Bureau complaint].... Now, although no such complaint was ever filed, a draft was in fact given to Local 183 at that time, and a copy has since been filed in evidence in these proceedings. There the complainant seeks the same [relief] earlier sought, a declaration of nullity of the purported collective agreement between *Lakeview* and Local 183 or, in the alternative, of the subcontracting clauses contained therein. Of particular note is the admission found in the draft section 89 complaint that the allegations made against Local 183 and the issues raised are identical there and in Board Files 0554-83-U [the Bureau complaint], 0985-84-M, 1201-84-JD, 1504-84-M, and 2386-84-M.

7. In the Presidential decision, the Kuttner panel characterized the issue before it as follows (in paragraph 1 of their decision): "Ought the Board to entertain a section 89 complaint, the substance of which is already the subject of complaint proceedings pending before it - and one moreover, arising from facts and circumstances long known to the complainant but concerning which it has chosen not to press for remedy?" In that case, counsel for Local 183 argued that the Board ought not to entertain the complaint on the grounds of abuse of process, unconscionable

delay, and *res judicata*. The Kuttner panel rejected counsel's contention that the matter was *res judicata*, but found merit in his other submissions. In doing so, they wrote, in part, as follows:

16. ... We turn then to consider the issues of abuse and delay, which we see as closely interrelated factors which cannot but lead us to exercise our statutory discretion against the complainant by declining to entertain this application as requested.
17. A recurrent theme found in the jurisprudence emanating from both the Labour Boards and the Courts is that delay is inimical to the furthering of a healthy collective bargaining relationship. Mr. Justice Pigeon captured the essence of that theme in *Komo Construction Inc. et al. v. Commission des Relations de Travail du Québec, et al.* [1968], S.C.R. 172 when he cautioned:

“Il ne faut pas oublier que la Commission exerce sa juridiction dans une matière où généralement tout retard est susceptible de causer un préjudice grave et irrémédiable” (at p. 176).

The same theme is echoed in the truism “Labour relations delayed are labour relations defeated and denied” often repeated in decisions of both Boards and Courts. See *General Bearing Services Ltd.*, [1980] OLRB Rep. Aug. 1200 where both Board and Court decision are collected. It is said that this concern is particularly acute in certification proceedings (*ibid* p. 1202), although it is by no means so limited. It is a concern expressed as well in proceedings such as these where a complaint of unfair labour practice has been filed against a party or parties alleging breach of our labour legislation. Indeed, in several jurisdictions, legislators particularly sensitive to the “prejudice grave et irremédiable” which could arise in the failure to prosecute such a complaint timeously have limited severely the time period within which these may be filed. See for example the *New Brunswick Industrial Relations Act*, RSNB 1973 c. I-4, s.106(11) - 90 days; the *Canada Labour Code*, R.S.C. 1970, C.L.-1 (as amended), Div. IV, s.187(2) - 90 days and see as well *Upper Lakes Shipping Ltd. v. Shehan et al.* (1979), 95 D.L.R. (3d) 25 (S.C.C.). In jurisdictions such as ours, the concern is not the less acute solely because of the absence of such a statutory time bar. Rather, it has been subsumed into and found expression in the Board's jurisprudence with respect to the statutory discretion vested in it by section 89 of the Act to entertain a complaint filed pursuant to its provisions.

18. The underlying collective bargaining principles which inform the Board's exercise of its discretion, and the relevant factors to consider where it is asked to exercise its discretion against the complainant are best expressed in the *Corporation of the City of Mississauga*, [1982] OLRB Rep. Mar. 420, where Vice-Chair MacDowell, speaking for the panel, wrote:

20. It is by now almost a truism that time is of the essence [in] labour relation matters. It is universally recognized that the speedy resolution of outstanding disputes is of real importance in maintaining an amicable labour-management relationship. In this context, it is difficult to accept that the Legislature ever envisaged that an unfair labour practice, once crystallized, could exist indefinitely in a state of suspended animation and be revived to become a basis for litigation years later. A collective bargaining relationship is an ongoing one, and all of the parties to it - including the employees - are entitled to expect that claims which are not asserted within a reasonable time, or involve matters which have, to all outward appearances, been satisfactorily settled, will not reemerge later. That expectation is a reasonable one from both a common sense and industrial relations perspective. It is precisely this concern which prompts parties to negotiate time limits for the filing of grievances (as the union and the employer in this case have done) and arbitrators to construct a principle analogous to the doctrine of laches to prevent prosecution of untimely claims. (See *Re C. G. E. 3 L.A.C. 980* (Laskin); and *Re Oil Chemical and Atomic Workers, Local 9-672 and Dow Chemical of Canada Limited*, [1966] 18 L.A.C. 51 (Arthurs)).



21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay - holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind the potentially corrosive effect which litigation can have upon the parties' current collective bargaining relationship - quite apart from the outcome. Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.

22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involved retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.

See as well *Sheller-Globe of Canada Ltd.*, [1982] OLRB Rep. Jan. 113, application for judicial review *sub. nom.*; *Re Dhanota and International Union United Automobile, Aerospace & Agricultural Implement Workers of America (U.A.W.), Local No. 1285*; *Sheller-Globe of Canada Ltd.*, (1983) 148 D.L.R. (3d) 569 (H.C.J., Div. Ct.) dismissed.

19. In calculating a measurement "in months rather than years", it does not avail the complainant to plead that the particular collective agreements and the contracting clauses which they contain are of a recent provenance. The Toronto Housing Labour Bureau, of which Bramalea Limited is a member, has had a collective agreement on identical terms with Local 183 since 1983; similarly so in the case of the Presidential Group Limited and Presidential Group (Brookshire) Limited. Nor may the complainant assert that its [cause] of action arises in the attempt by Local 183 to enforce the provisions of the impugned subcontracting clauses against the contractors bound, either formally as in the case of Presidential (Board File 1324-85-M) or informally as in the case of Bramalea, both of which incidents occurred shortly before the filing of the instant complaint. To do so would be to elevate form over substance in a manner which would make a mockery of the fundamental collective bargaining principles which inform the Board's determinations in the exercise of its section 89(4) discretion in much the same manner that the late Chief Justice Laskin characterized the attempted filing of a complaint of unfair labour practice in the *Upper Lakes Shipping* case, *supra*, in the face of a statutory time bar. He wrote there at p. 29:

"I do not disagree with the Federal Court of Appeal that [it] was appropriate to measure the timeliness of a complaint from March 1, 1973 when the subject matter thereof became a prohibited practice. However, I cannot agree that there can be any number of requests and refusals, relating to the

same circumstances, to enable a complainant to found a succession of complaints under section 187(1) so long as he takes care to bring them successively within ninety days of any [request] and refusal. That would make a mockery of section 187(2) even if it was applicable irrespective of *res judicata*, which was not mentioned by the Federal Court of Appeal.”

Here, there is no question but that the substance of this complaint long predates the particular agreements and incidents complained of. Indeed, the collective bargaining relationships between Bramalea, Presidential and Local 183 serve merely as a convenient foil for the prosecution of a complaint which Local 27 and its predecessor in title, Local 1190, have had against Local 183 and any and all of the many contractors, developers and builders within the residential housing sector with which it has a bargaining relationship since the commencement of this representational dispute in 1981. This is as much as admitted by the complainant in this very application when it advises that the issues here raised are identical to those raised in its earlier filed complaint [the Bureau complaint]. Surely, it was with the filing of that complaint in June 1983 that the issue here sought to be litigated crystallized and the incidents here related and complained of could be, at most, subsequently materialized particulars in that original complaint.

20. On such a reading of the matter it becomes a foregone conclusion that the delay here occasioned must be fatal to the filing of this complaint. Each of the factors enumerated above in the Mississauga case can only be marshalled against the interest of the complainant. The length of the delay is excessive and arises years after it had become aware of the alleged statutory violations; the nature of the remedy claimed would strike at the heart of a pattern of hundreds of bargaining relationships which have developed, flourished and expanded within the residential framing sector of the construction industry since the alleged contravention first arose; there is in addition the existence of factors which would hamper and impede a fair hearing of the issues in the setting of freshly filed section 89 proceedings, including fading recollection, unavailability of witnesses, deterioration of evidence and the disposal of records. From all the foregoing, the Board concludes that, setting aside for a moment the convoluted history of the struggle between these two protagonists, the delay in the prosecution of a section 89 complaint by Local 27 attacking the integrity of the bargaining relationships entered into by Local 183 on the strength of no subcontracting clauses of which Local 27 or its predecessor Local 1190 were aware from their first inception and with respect to which exception has been taken in principle from almost that same moment, would alone suffice for the Board to conclude that it ought to exercise its section 89(4) discretion to refuse to entertain the complaint here filed.
21. There is, however, a further consideration which impels the Board to this conclusion, and that is the abuse inherent in the very filing of the instant complaint. For our reading of the circumstances of this case make it at once clear to even the most casual observer, that the complainant here has sought to file identical section 89 complaint proceedings arising out of the same cause. Not only that, but the earlier complaint filed stands adjourned, if not at the instance, then at least on the consent of the complainant at the very moment when counsel for Local 183 was on the point of cross-examining the principal witness of the complainant who, whether by way of evasion or innocent happenstance, had avoided service of a subpoena *duces tecum* issued at the instance of Local 183. In such circumstances, to acquiesce as requested and entertain the instant complaint would be to countenance the most flagrant abuse of the Board's process. It is simply inconceivable that a tribunal judicially charged would permit the suspension of litigation already in process and its refile and prosecution anew at the instance of the complainant. In circumstances somewhat analogous to these, McRae, J. has characterized the bringing of multiple proceedings arising out of the same circumstances and seeking the same relief as “frivolous and vexatious”. See *Mascan Corporation v. French* (1986) 8. C.P.C. (2d) 187 (H.C.J.). We are of a similar mind and, if so required, would, even in the absence of the delay here present, have exercised our section 89(4) discretion against the complainant as the filing of the instant complaint is an abuse of the Board's process.....

8. It is common ground among the parties that the Dellbrook complaint raises similar issues to those raised in the Bureau complaint and in the Presidential complaint. Moreover, as acknowledged by counsel for the Carpenters in his able submissions before this panel, the factual circumstances regarding the filing of the Dellbrook complaint are indistinguishable from the factual circumstances regarding the filing of the Presidential complaint. The reasoning applied by the Kuttner panel in deciding to dismiss the Presidential complaint is equally applicable to the Dellbrook complaint. We respectfully adopt and apply that reasoning in reaching a similar decision in respect of the latter. Accordingly, the Board, in the exercise of its discretion under section 89(4) of the Act, hereby declines to inquire into the Dellbrook complaint. The Carpenters' willingness to have that complaint consolidated with the Bureau complaint does not assist their position as, for the reasons set forth below, we are of the view that the Bureau complaint should also be dismissed.

9. As indicated above, the Bureau complaint was filed with the Board on June 15, 1983. The hearing of that complaint commenced on June 27, 1983 before a panel of the Board composed of K. M. Burkett who, prior to leaving the Board in May of 1984 to pursue a career as an arbitrator and mediator, was the Board's Alternate Chairman; Board Member J. P. Wilson, who passed away in September of 1987; and C. A. Ballentine, the only member of that panel ("the Burkett panel") who is still on the Board. In their preliminary ruling quoted in paragraph 7 of the Presidential decision, the Burkett panel found that the complaint was not untimely, but indicated that the Carpenters' "delay in responding to the events complained of in paragraphs 1, 2 and 3 of Schedule B may affect remedy." Those paragraphs read as follows:

1. On August 14, 1981, the Respondents, Labourers' International Union of North America, Local 183 ("Local 183") and Greenpark Homes, entered into a collective agreement.

2. On December 4, 1981, Local 183 and the Respondents, Philmor Developments Limited and Mor-Alice Construction Limited entered into a collective agreement.

3. Both the collective agreements referred to in paragraphs 1 and 2 hereof contained the following provision:

"Effective January 1, 1982, the Employer shall only employ and/or sub-let work to a carpentry contractor who is in contractual relations with the Union. However, should there be no agreement negotiated by the Union and any group of carpentry contractors for this type of work effective January 1, 1982, then the Employer shall only be bound to employ such carpentry contractors as of the effective date of the appropriate carpentry collective agreement."

Thus, the events about which the Carpenters had delayed in filing a complaint occurred in August and December of 1981, in respect of a collective agreement provision which was to become effective on January 1, 1982.

10. As indicated above, the hearing of the merits of the Bureau complaint commenced in July of 1983 before the Burkett panel. Local 1190 called Kenneth Weller as its first witness. Local 1190's examination in chief of Mr. Weller was completed on July 6, as was the Bureau's cross-examination of that witness. Cross-examination by counsel for Local 183 was to commence on July 8. On July 7, Local 183 obtained a subpoena *duces tecum*, but was unable to serve it on Mr. Weller until the next day. On July 8, 1983, after hearing submissions regarding the scope of the subpoena and the propriety of Local 183 seeking to attack Local 1190's residential home building bargaining rights as a defence to the complaint, Mr. Burkett made the following ruling on behalf of the panel (as recorded in Exhibit L6, which is a transcript of the July 8, 1983 hearing):

The panel has been asked to rule upon the scope of the subpoena served on Mr. Weller this morning and indirectly our ruling in this regard affects the scope or the extent of the scope of



our inquiry into this matter generally. The Complainant Carpenters' Union, alleges in this matter that the Respondent, Local 183 of the Labourers, unlawfully interfered with the bargaining rights in the residential home building sector. Mr. Weller, the first witness for the Complainant, Carpenters Union, testified to the extent of these bargaining rights in his evidence in-chief. The Respondent, Labourers' Union, seeks to attack the validity of these bargaining rights as a defence to the allegations against it. We are satisfied that this is a proper defence and that evidence called in respect thereof regardless of the existence of a separate Section 89 complaint launched by Local 183 challenging the bargaining rights of the carpenters is relevant and can be pursued in the cross-examination of Mr. Weller.

The Respondent, [Local] 183, was entitled to subpoena Mr. Weller when it did. Furthermore, we are satisfied that the documents demanded with the amendment to paragraph 3C of the subpoena as discussed insofar as they may support the Local 183 defence are relevant and, therefore, Mr. Weller is required to comply with the subpoena as modified in its entirety.

(Before adjourning, the panel also ruled that counsel for Local 1190 was entitled to confer with Mr. Weller upon receipt of the particulars of Local 183's aforementioned defence.)

11. The Bureau complaint was scheduled for continuation of hearing on November 18, 1983. However, that hearing was cancelled on November 16 after counsel notified the Registrar that the parties had agreed to adjourn it (and File No. 0320-83-U) *sine die*. In accordance with the Board's usual practice in such matters (as set forth in Practice Note No. 14, dated March 24, 1981), the Burkett panel issued the following (unreported) decision on November 18, 1983 in respect of the Bureau complaint:

Having regard to the agreement of the parties the Board hereby consents to adjourn this complaint *sine die* for a period not exceeding one year. Unless within that time, the parties request that the Board proceed with the matter, it will be terminated.

(An identical decision was also issued at that time in respect of File No. 0320-83-U.)

12. The Bureau complaint lay dormant for almost a full year until counsel for the Carpenters wrote as follows to the Registrar (with a copy to counsel for the Labourers) in a letter dated November 8, 1984:

On behalf of the Complainant in the above-noted matter [Board File No. 0554-83-U] we request the Board to resume hearings in the above-noted Complaint.

That letter was received by the Board on November 9, 1984, but was not acknowledged. It prompted the following response from Labourers' counsel in a letter delivered to the Board (and to Carpenters' counsel) on November 13, 1984:

We are in receipt of a letter addressed to you from David McKee dated November 8, 1984 in which he requested that the Board resume hearings in file number 0554-83-U.

On November 15, 1983 the undersigned wrote to the Board to indicate that the parties had agreed to adjourn Board Files 0320-83-U and 0554-83-U *sine die*. A copy of that letter is attached hereto. The letter reflected the agreement of the parties that both s.89 complaints would be adjourned *sine die*.

The Board issued decisions in respect of both matters on November 18, 1983 as follows:

"Having regard to the agreement of the parties the Board hereby consents to adjourn this complaint *sine die* for a period not exceeding one year. Unless within that time, the parties request that the Board proceed with the matter, it will be terminated."

The Board in issuing its decisions did not countenance allowing the parties to allow virtually a

year to elapse before they proceeded with the complaints, but rather simply indicated that if the matters were not proceeded with within the year they would be automatically terminated.

Local 183 submits that there has been *laches* and unreasonable prejudicial delay by Local 1190 in the processing of the complaint and that it is unfair and unreasonable in all of the circumstances to now allow Local 1190 to proceed with the matter. The Board is urged not to schedule further hearings in this matter and in the alternative, to schedule a hearing to entertain the submissions of the parties as to why the Board should not exercise its discretion to refuse to entertain the complaint ....

13. Reference was made to the Bureau complaint in the Presidential complaint. Paragraph 17 of Schedule "A" to the latter complaint reads as follows: "The same issues raised by this complaint are also raised in a complaint between Local 1190 and Local 183 (Board File No. 0554-83-4 [sic]), which Local 1190 has asked the Board to relist for hearing." Counsel for the Carpenters referred to that paragraph in a letter dated December 2, 1985 to counsel for the Labourers, a copy of which was sent to the Board's Registrar.

14. The Dellbrook complaint was filed with the Board on June 12, 1986. The complaint was accompanied by the following letter from counsel for the Carpenters:

We enclose herewith a copy of a complaint under section 89 of the *Act*. The complaint makes reference to two complaints filed by Local 27 in which similar issues are raised, namely Board File 0554-83-U and 1445-85-U. As you are no doubt aware, we have asked on behalf of our clients to have the first matter relisted for hearing. The second matter was last heard June 5th, 1986.

The Board may make an order with respect to the separation or order or [sic] consolidation of the aforementioned files. It might well be possible to combine this complaint with the previous two and certainly with Board File 1445-85-U if, as we suspect, Dellbrook Homes as [sic] entered into the collective agreement between Local 183 and the Toronto Housing Labour Bureau. If it has not done so, there is no reason to consolidate the matters.

15. On December 9, 1986, Frank Rimes, the Business Manager of Local 27, wrote to the Chair of the Board to complain, among other things, that the Bureau complaint had not been relisted for hearing. In that letter Mr. Rimes stated that "[m]any requests have been made to have this matter relisted." However, there is no cogent evidence before the Board of any such requests, other than the request contained in counsel's letter of November 8, 1984, and counsel's reference to that request in the letter quoted in the preceding paragraph of this decision.

16. On January 7, 1987, the Registrar forwarded to the parties to the Bureau complaint a (Form 8) Notice of Hearing which indicated that a Board hearing would take place on January 26, 1987 for the purpose of "permitting the complainant to show cause as to whether the Board should now entertain the complaint." Notice of hearing was also forwarded to the parties to the Dellbrook complaint in respect of that date. At that hearing the parties advised the Board panel (which consisted of Vice-Chair Satterfield and Board Members R. D. McMurdo and H. Kobryn) that the decision which they were awaiting in the Presidential complaint might assist them in determining how to proceed and, accordingly, that they were in agreement that the two complaints should be adjourned pending that decision. Having regard to that agreement, the panel adjourned the matters "until one of the parties requests that they be brought on for hearing".

17. After the parties were advised by telegram in March of 1987 that the Kuttner panel had decided to uphold counsel for the Labourers' preliminary objection (and that reasons for the decision would follow), counsel for the Carpenters wrote to the Registrar to request that the Board relist the Bureau and Dellbrook complaints. The complaints subsequently came on for hearing on September 22, 1987 before a panel consisting of Vice-Chair Brown and Board Members Ronson

and Grasso. After ruling that they had jurisdiction to hear the Labourers' motion for dismissal, deciding the order in which counsel would make their submissions concerning that motion, and arranging for an exchange of documents, that panel adjourned the matters and requested the parties to confer with the Registrar regarding further dates. These two complaints were subsequently listed for hearing before the present panel on December 14, 15, and 16, 1987. At the commencement of the hearing on December 14, the writer advised the parties that he had been assigned to replace Vice-Chair Brown, who was (and is) away indefinitely on sick leave. None of the parties objected to that substitution, although counsel for the Labourers maintained his objection, which had been unanimously rejected by Vice-Chair Brown and Board Members Ronson and Grasso, that only the Burkett panel had jurisdiction to deal with the Bureau complaint. In confirming that ruling, we noted that the death of Board Member Wilson had made it impossible to reconvene that panel. Moreover, section 102(4) of the Act expressly empowers the Chair to "from time to time assign the members of the Board to its various divisions" and to "change any such assignment at any time".

18. Labourers' counsel submitted that by November of 1984 when the Carpenters requested that the hearing of the Bureau complaint be resumed, the Carpenters were already precluded from proceeding on the basis of unreasonable delay. Counsel for the Carpenters, on the other hand, submitted that they were entitled to request that resumption at that time, and referred the Board to *Brytor International*, [1985] OLRB Rep. March 372, in support of his position. In the circumstances of this case, we find it unnecessary to decide that issue, as even if the Carpenters were entitled to wait until almost the end of that one-year period before requesting a resumption of hearing, their subsequent failure to follow up on that request in a timely fashion, to the prejudice of the other parties, makes it inappropriate to permit the complaint to proceed.

19. We agree with counsel for the Carpenters that the Board is responsible for some of the delay which has occurred in this case. However, when the Board failed to acknowledge counsel's letter of November 8, 1984, and then did not relist the matter, one would expect that if the Carpenters truly wished to have the matter proceed, they or their counsel would have contacted the Registrar within a reasonable time to ascertain why nothing had happened, or would have forwarded a further written request urging that the matter be relisted as soon as possible. (See, generally, *Michael Baranowski*, [1987] OLRB Rep. May 645, and *Monte Carlo Carpentry*, [1982] OLRB Rep. June 914.) This is particularly true in the circumstances of the instant case in which counsel for the Labourers responded to the Carpenters' request that the Board resume hearings in the Bureau complaint by immediately opposing that request on the basis of "laches and unreasonable prejudicial delay", and urging the Board not to schedule further hearings in the matter. Although the Carpenters made some reference to the Bureau complaint in other documents (as noted above), there is no cogent evidence of any such contact or further request having been made until June of 1986 when, in the covering letter which accompanied the Dellbrook complaint, counsel for the Carpenters stated: "As you are no doubt aware, we have asked on behalf of our clients to have [Board File 0554-83-U] relisted for hearing." The Carpenters' failure to take reasonable steps during that lengthy period to ensure that the Board was aware of their request to have the matter relisted, and that it was acting upon the request, created a situation in which the respondents would be substantially prejudiced if the Board were to now permit the complaint to proceed. As time passed, the difficulties involved in reconvening the Burkett panel to continue with the hearing became increasingly severe. As indicated above, Mr. Burkett left the Board in May of 1984, to pursue a career as an arbitrator and mediator. As time went by, the ever increasing demands which those roles made upon his time rendered it more and more unlikely that he would be in a position to make available in a timely fashion the number of hearing days required to complete the hearing of the Bureau complaint. With the demise of Board Member Wilson, it is now impossible to reconvene that panel. In addition, the nature of the remedy sought by the Carpenters would strike at the



heart of bargaining relationships which have developed, flourished, and expanded within the residential framing sector of the construction industry since 1981, when the alleged contraventions first occurred. Having regard to all of the circumstances, we are unanimously of the view that it would not be in the best interests of sound labour relations to permit the Bureau complaint to proceed at this belated juncture.

20. For the foregoing reasons, the Board, in the exercise of its discretion under section 89(4) of the Act, hereby declines to inquire into these complaints. Accordingly, the complaints are hereby dismissed.

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**2299-87-R International Brotherhood of Electrical Workers, Local 804, Applicant v. Engineered Electric Controls Limited, Respondent.**

**Certification - Construction Industry - Construction industry certification application converted to an application under the general provisions of the Act on agreement of the parties - Certificate issued pursuant to general provisions - Union now seeking construction industry bargaining rights - *Res judicata* not applicable - Case relisted for determination of issue of whether employer is an employer in the construction industry**

**BEFORE:** Inge M. Stamp, Vice-Chair, and Board Members W. N. Fraser and H. Kobryn.

**APPEARANCES:** Bernard Fishbein, J. Wilson and T. Keagan for the applicant; Ian S. Campbell and Wayne Fischer for the respondent.

**DECISION OF THE BOARD;** February 8, 1988

1. This is an application for certification made pursuant to the construction industry provisions of the *Labour Relations Act*.
2. This application came before the Board on February 1, 1988 to hear the evidence and representations of the parties with respect to all outstanding issues, including the list and composition of the bargaining unit and the matters raised by the respondent in its reply.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on December 12, 1977, the designated employee bargaining agency is the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario.
4. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or

- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

5. The applicant is seeking to represent all electricians and electricians' apprentices in the employ of the respondent:

- (a) in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario;
- (b) in all sectors of the construction industry, save and except the industrial, commercial and institutional sector, in OLRB geographic area no. 6,

save and except non-working foremen and persons above the rank of non-working foreman.

6. There were lengthy submissions by the parties with respect to the issue of *Res Judicata*. It is not necessary to set these out in detail; however, the thrust of the respondent's and applicant's positions are set out below.

7. Counsel for the respondent submitted that this panel has no jurisdiction to hear this application because an identical application, involving the same parties, was heard and dealt with by another panel and disposed of in Board File #1381-86-R. It is the respondent's position that the current application is therefore *Res Judicata*.

8. Paragraphs 3 and 5 of the decision in Board File #1381-86-R state:

3. The application came before the Board for hearing on September 12, 1986, respecting certain issues raised by the reply, one of which was whether the respondent operated a business in the construction industry. The hearing was not completed that day, so the application was listed for continuation of hearing on October 21, 1986. When the parties came before the Board on that date, they had reached agreement to request the Board to process the application as though it had been made under the general provisions of the Act for a unit of employees described in terms of all electricians and electricians' apprentices which would be a unit appropriate for collective bargaining pursuant to section 6(3) of the Act.

5. Having further regard to the agreement of the parties, to the evidence before the Board, particularly the evidence respecting the nature of the work performed by the employees in question and to the provisions of section 6(3) of the Act, the Board finds that all electricians and electricians' apprentices employed by the respondent at or out of Cambridge, Ontario, save and except non-working foremen, persons above the rank of non-working foreman, office and sales staff, constitute a unit of employees appropriate for collective bargaining pursuant to section 6(3) of the Act.

The respondent submits that in order for the panel to determine the appropriate bargaining unit it must have made a finding that this employer was not an employer in the construction industry and that the applicant cannot now come to the Board, albeit one year or so later, and make another application for certification under the construction industry provisions of the Act. The respondent further stated that the IBEW already has bargaining rights for the electricians and electricians' apprentices in its employ. The respondent also argued that this application was in fact a disguised request for reconsideration of the earlier decision by the Satterfield panel and should have been brought under section 106(1).

9. Counsel for the applicant stated that this application is not a request for reconsideration, that there is a certificate pursuant to the general provisions of the Act issued in Board File #1381-86-R, and that the union is now seeking construction bargaining rights which they are entitled to do under the provisions in the Act. Since there was no adjudication on the merits in the previous decision, *Res Judicata* is not applicable.

10. After considering the submissions of the parties, the Board gave the following oral ruling:

Regarding the issue of *Res Judicata* and whether or not this matter has already been adjudicated in Board File #1381-86-R, it is the Board's unanimous ruling that *Res Judicata* does not apply to the instant application for certification in the construction industry. The application in Board File #1381-86-R, although filed under the construction industry provisions of the Act, was clearly converted (on agreement of the parties) to an application under the general provisions of the Act. At this point there was *no longer* a construction application before the Board, and it was not necessary for the Board to make any determination with respect to whether or not construction work was involved in that application.

The decision issued by the Satterfield panel on October 23, 1986 reflects only the agreement of the parties and does not make a determination of whether or not the respondent is an employer in the construction industry.

11. At this point in the proceeding the parties agreed to deal with the bargaining unit description and the list of employees. The respondent agreed with the description of the bargaining unit in the application. The applicant challenged the list of employees.

12. The parties further agreed to exchange documents with a view to arriving at an agreed statement of facts and to the setting of two more dates for hearing.

13. The exchange of documents as agreed to by the parties will be as follows:

The respondent to provide documents to the applicant by Friday, March 18, 1988.

The applicant to provide its reply to the respondent by Thursday, March 31, 1988.

14. This matter is to be continued for hearing Wednesday April 20 and Thursday April 21, 1988 with respect to the remaining issues in dispute, including whether or not the employer is an employer in the construction industry.

15. The matter is referred to the Registrar.

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**2445-86-R; 0942-87-U** United Brotherhood of Carpenters & Joiners of America, Local Union 27, Applicant v. **F. T. Construction Inc.**, Respondent; United Brotherhood of Carpenters and Joiners of America, Local 27, Complainant v. Labourers' International Union of North America, Local 183 and **F. T. Construction Inc.**, Respondents

**Bargaining Rights - Certification - Construction Industry - Intimidation and Coercion - Reconsideration - Unfair Labour Practice - Intervener requesting that Board revoke certificates issued to applicant on basis that intervener had a collective agreement with the respondent employer at time certificates issued - Whether agreement void due to employer support - Agreement signed following a recognition strike - Collective agreement deemed void - Reconsideration denied**

**BEFORE:** *G. T. Surdykowski*, Vice-Chair, and Board Members *D. A. MacDonald* and *C. A. Balentine*.

**APPEARANCES:** *David A. McKee* and *Joe Almeida* for the applicant/complainant; *L. A. Richmond*, *Q. Ceolin* and *A. Pinto* for Labourers' Local 183; *Fernando Oliveira* for **F. T. Construction Inc.**, respondents.

**DECISION OF THE BOARD;** February 16, 1988

1. Board File No. 2445-86-R is an application for certification. By decision dated December 19, 1986, pursuant to section 144(2) of the *Labour Relations Act*, the Board issued two certificates to the applicant United Brotherhood of Carpenters and Joiners of America, Local Union 27 ("Local 27"): one on its own behalf and on behalf of all other affiliated bargaining agents of its employee bargaining agency in respect of all carpenters and carpenters' apprentices in the employ of **F. T. Construction Inc.**, in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman, and another to Local 27 in respect of all carpenters and carpenters' apprentices in the employ of **F. T. Construction Inc.**, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial, and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman. By letter from counsel dated June 3, 1987, the intervener, Labourers' International Union of North America, Local 183 ("Local 183") asserted that it had just discovered that the Board had issued those certificates and requested reconsideration of the Board's decision with respect thereto on the basis that, in December 1986, it had a collective agreement with **F. T. Construction Inc.**, and, accordingly, ought to have been given notice of the application and an opportunity to participate therein. Local 27 opposed this request on the basis that Local 183 did not hold the bargaining rights asserted and also filed a complaint under section 89 of the Act (Board File No. 0942-87-U) in which it sought a declaration that Local 183 holds no bargaining rights with respect to **F. T. Construction Inc.**, on the basis that the agreement on which Local 183 relies is void due to employer support, and that Local 183 had, in any event, abandoned any such bargaining rights.

2. Fernando Oliveira is a principal of **F. T. Construction Inc.**, ("F.T."). From July 1979 to sometime in 1985, Mr. Oliveira carried on business as a sole proprietor under the name of Minho Carpentry ("Minho"). On June 29, 1983, Minho and Local 183 entered into a collective agreement effective from January 4, 1983 to April 30, 1985. At the time they did so, Minho was a sub-subcon-

tractor on a housing project which Philmor Developments Limited and Mor-Alice Construction Limited ("Philmor") together, as some sort of partnership or joint venture, was the general contractor. Local 183 had a collective bargaining relationship with Philmor and was in a legal strike position with respect to that employer pursuant to which it established a picket line at the project on June 29, 1983.

3. The picket line effectively shut down the project and, within a matter of hours, Local 183 had obtained a commitment from Philmor that it would sign a new collective agreement. It was also agreed between them that all employees on the project would have to be members of Local 183, regardless of who actually employed them. Notwithstanding that no collective agreement had yet been executed (and none was until August 8, 1983), Philmor indicated to Local 183 that the latter could go onto the project for the purpose of signing all employees on the project into membership. Apparently, Philmor also advised its sub-contractors, of which one was Investments Carpentry which had in turn subcontracted work to Minho, of this. The principal of Investments Carpentry, Nick DeGiorgio, called a number of the persons working on the project, including Mr. Oliveira and the two persons the latter employed at the time, to a meeting at one of the uncompleted houses at the project. Mr. DeGiorgio told those so assembled that they had to become members of Local 183 in order to continue to work on the project. Although Mr. Oliveira's testimony was less than clear on the point, we are satisfied that Mr. DeGiorgio explained that Philmor was obligated to use only Local 183 sub-contractors and employees and that, as a result, so was Investments Carpentry. There was, however, no specific mention of a sub-contracting provision. A short time later, on the same day, a number of Local 183 business agents appeared and asked Mr. Oliveira and his two employees to become members of Local 183. All three signed applications for membership and paid \$1.00 in respect thereof, in each others presence. Still later that same day, Mr. Oliveira executed the aforesaid collective agreement with Local 183 on behalf of Minho. Mr. Oliveira testified that he signed because "Investments said I had to".

4. Subsequently, Mr. Oliveira caused F. T. to be incorporated on September 16, 1985 and ceased to operate as Minho. In September of 1985, F. T. was engaged at a job site in Mississauga as a subcontractor for Mattamy Homes. In October 1985, Local 183 discovered Mr. Oliveira working on that job site. One of Local 183's business agents approached Mr. Oliveira who advised him that he was operating as F. T., not as Minho. When asked to sign a collective agreement to F. T., Mr. Oliveira refused and Local 183 established a picket line to persuade him to do so. In the circumstances, Mr. Oliveira felt compelled to capitulate and on November 20, 1985, F. T. entered into a collective agreement with Local 183.

5. At the time that Mr. Oliveira and his two employees signed Local 183 membership cards, there was no collective agreement in effect between Local 183 and any of Philmor, Investments Carpentry, or Minho. Accordingly, the validity or effect of a sub-contract clause is not in issue. Nor did there exist a kind of situation contemplated by either section 46(1)(a) of the *Labour Relations Act* or approved by the Board in *Nicholls-Radke*, [1982] OLRB Rep. July 1028. Minho (which had no legal existence separate from Mr. Oliveira) and its two employees were told, by the employer which had brought Minho onto the job site, that, if they wanted to continue working on the site, they would have to become members of Local 183. Later that same day, a number of Local 183 business agents descended upon the job site. In the course of a flurry of signing activity, the two Minho employees signed Local 183 membership cards, in the presence of their direct employer who also signed. It is clear that Philmor, Investments Carpentry and Minho all assisted Local 183 by effectively and improperly compelling the employees of Minho to become members of Local 183. Further the collective agreement between Local 183 and Minho was not freely entered into. It was a direct result of coercion by Philmor and Investments Carpentry.

6. It is fundamental to the *Labour Relations Act* that there be an arms length relationship between trade unions and employers and that every person be free to join or not join any given trade union. We are satisfied that the actions of the employers as aforesaid have violated those fundamental principles and constitute improper "other support" to Local 183 within the meaning of clause (a) of section 48 of the Act. Accordingly, the agreement between Local 183 and Minho must be deemed not to be a collective agreement for purposes of the Act.

7. No declarations under either sections 1(4) or 63 of the Act have been made (or sought) with respect to Minho and F. T. Nevertheless, Local 183 asserted, in its Reply, that the two were either one employer for purposes of the Act, or F. T. is a successor employer to Minho, and the case was argued on that basis. There was no suggestion that the validity of the collective agreement between Local 183 and F. T. was anything other than dependent upon the one said to exist between Local 183 and Minho. The mere fact that the second agreement was entered into does not, in our view, cure the improprieties that led to the first. Consequently, just as the first fell, so must the second. Accordingly, pursuant to clause (a) of section 48 the agreement between Local 183 and F. T. must also be deemed not to be a collective agreement for purposes of the Act. Indeed, absent the foundation of a collective agreement with Minho, the activity of Local 183 which led to an agreement with F. T. constitutes a recognition strike which constitutes a breach of the Act and would lead to the same result (see *Traugott Construction Limited*, [1981] OLRB Rep. Nov. 1680; request for reconsideration denied at [1982] OLRB Rep. June 958; application for judicial review dismissed at 45 O.R. (2d) 129 (Div. Ct.)).

8. In the result, the Board declares that Labourers' International Union of North America, Local 183 holds no bargaining rights with respect to either Minho Carpentry or F. T. Construction Inc. Nor, in the Board's view, is it appropriate to revoke or in anyway vary its decision dated December 19, 1986 in Board File 2445-86-R and the same is hereby affirmed.

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**1253-87-R; 1283-87-R; 1362-87-R; International Woodworkers of America, Applicant v. Great Lakes Forest Products Limited, Respondent v. The Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, Intervener; Canadian Paperworkers Union, Applicant v. Great Lakes Forest Products Limited, Respondent v. The Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, Intervener; International Woodworkers of America, Applicant v. Kirouac Contracting Ltd., Respondent v. Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, Intervener #1 v. Canadian Paperworkers Union, Intervener #2**

**Bargaining Unit - Certification - Whether employees of contractors included in the bargaining unit represented by the incumbent - Ambiguous recognition clause leading Board to look at past practice - All disputed employees falling within the bargaining unit set out in the collective agreement - Incumbent's unit appropriate - Ballots ordered counted**

**BEFORE:** *Judith McCormack*, Vice-Chair, and Board Members *W. Gibson* and *E. G. Theobald*.



**APPEARANCES:** *H. M. Pollit* and *Fred Miron* for the International Woodworkers of America and The Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America; *F.J.W. Bickford*, *W. J. Murray*, *Lorne Crawford* and *Ray Cook* for Great Lakes Forest Products Limited; *N. L. Jesin* and *C. Makowski* for the Canadian Paperworkers Union; no one appearing for Kirouac Contracting Ltd.

**DECISION OF THE BOARD;** February 8, 1988

1. These are applications for certification in which the Canadian Paperworkers Union ("CPU") and the International Woodworkers of America ("IWA") have each applied to be the bargaining agent for the woodlands employees of Great Lakes Forest Products Limited ("Great Lakes"). Both have also applied for certification to represent employees of Kirouac Contracting Ltd. ("Kirouac") although the CPU takes the position that Kirouac employees are included within the Great Lakes bargaining unit. The Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America ("LSWU") has intervened, claiming to be an incumbent union with respect to both Great Lakes and Kirouac. The two applications with respect to Great Lakes arose first in time and the Board consolidated them pursuant to section 103(3) of the *Labour Relations Act*. A pre-hearing vote was requested in both applications and in the course of making the arrangements with respect to that vote, it became apparent that there was a difference of opinion with respect to the parameters of the bargaining unit between the IWA, the LSWU and Great Lakes on the one hand, which asserted that only certain employees of three contractors should be included in the Great Lakes bargaining unit, and the CPU on the other hand, which asserted that all the employees of those contractors should be included. As a result of that dispute, certain ballots were segregated when the vote was taken and the ballot box was sealed. (See *Great Lakes Forest Products Limited*, Board File Nos. 1253-87-R and 1283-87-R, unreported September 2, 1987.)

2. Before the vote was held in those applications, the IWA and the CPU applied for certification with respect to Kirouac Contracting Ltd., one of the contractors whose employees the CPU claims are properly part of the Great Lakes bargaining unit. The issue then arose as to whether the two Kirouac applications should be consolidated with each other pursuant to section 103(3), and whether they should be consolidated with the Great Lakes applications. Because there were significant consequences to a section 103(3) determination in these circumstances, the Board decided that it would defer the section 103(3) decision until the parties had an opportunity to lead evidence and make arguments at a hearing in this regard. A vote was also directed in the Kirouac applications and the ballot box sealed. (See *Kirouac Contracting Ltd.*, [1987] OLRB Rep. Oct. 1262.) The four applications then came on before this panel of the Board for a determination of the outstanding issues.

3. At the outset of the hearing, all parties agreed that the Board should first determine the bargaining unit issue and then the section 103(3) issue. Consequently, we now turn to the matter of the appropriate bargaining unit. All parties were also in agreement that the applicants should be required to "take" the bargaining unit represented by the incumbent. This is consistent with the Board's policy in *Milltronics Limited*, [1980] OLRB Rep. Jan. 56 where the Board noted that the established bargaining unit structure is *prima facie* appropriate in a displacement application. It was not argued that the Board should depart from the *Milltronics* principle or that there had been such difficulties with the existing bargaining unit that the presumption that it was appropriate would be rebutted. The problem in this case is ascertaining the precise contours of that existing bargaining unit.

4. In this regard, we find it useful to examine the recognition clause in the collective agreement between the LSWU and Great Lakes which reads as follows:

#### ARTICLE III - RECOGNITION - JURISDICTION

3.01 (a) The Company recognizes the Union as the sole collective bargaining agency for all of its employees who are engaged in woods operations on the limits, and on the work sites, of the Company. For purposes of this article, Company employees shall be all those employed in the job classifications set out in the wage schedule attached to and forming a part of this Agreement, including those who are employed on job classifications which may be established and become part of the attached wage schedule during the term of this Agreement.

3.01 (b) The employees of contractors engaged by the Company on the limits and work sites of the Company shall be considered employees within the terms of this Agreement; save and except the employees of contractors and/or the contractors who are engaged to perform occasional special services not commonly performed by employees covered by the terms of this Agreement, employees of contractors where such contractors are engaged for the purpose of erecting structures and where such a contractor is bound by an Agreement with a union or unions affiliated with a central labour body covering such work.

• • •

The CPU takes the position that this clause unambiguously includes employees of three dependent contractors, Esker Logging ("Esker"), Ear Falls Contracting and Kirouac within the Great Lakes bargaining unit. The IWA, LSWU and Great Lakes claim that the clause is ambiguous and that the Board must look to the past practice of Great Lakes and the LSWU as an aid to interpreting it. That past practice is alleged to show that only certain of the employees of Esker and Ear Falls Contracting who are included on the Great Lakes seniority list are within the bargaining unit, and that none of the Kirouac employees are included. To understand the parties' respective positions, it is necessary to set out some of the background to these applications.

5. Prior to the spring of 1987, Great Lakes employed a number of individuals directly in harvesting and cut and skid operations in the Red Lake and Ear Falls areas of northern Ontario. It also employed a number of contractors including Ear Falls Contracting, Esker and Kirouac, each with its own unique history with Great Lakes. Turning first to Ear Falls Contracting, in 1975 Dryden Paper Company Limited ("Dryden") a predecessor company to Great Lakes, decided to expand operations in the Ear Falls and Red Lake areas. Ear Falls Contracting was formed to do road construction and right-of-way cutting. The LSWU, which had been certified as a bargaining agent for certain Dryden employees in 1955, approached Dryden claiming that the individuals nominally employed by Ear Falls Contracting were covered by the LSWU collective agreement with Dryden. Lorne Crawford, then woodlands manager of Dryden, testified that Dryden wished to have one union covering all Ear Falls Contracting employees and since cutting was involved as well as road construction, Dryden decided that LSWU was the appropriate union in terms of work jurisdiction. At that time, the collective agreement between the LSWU and Dryden contained the following provision, agreed to in 1966 and now also appearing in the current collective agreement between LSWU and Great Lakes:

#### ADDITIONAL UNDERSTANDING REACHED DURING NEGOTIATIONS OF DECEMBER 28 AND DECEMBER 29, 1966

Certain understandings regarding Article III - Recognition and Jurisdiction of the Agreement (re: 3:01(b) Contractors) agreed to hereunder:

The Company and the Union agree to extend the current practice established under the terms and conditions of expired Agreement (December 1st, 1964 - September 30,

1966) to March 31st, 1967 under the revised provisions of the Agreement, and then effective April 1st, 1967 -

Where a contractor is engaged by the Company on hauling operations or road construction, employees who are hired to perform such jobs for the contractor shall be considered as new employees and shall not establish seniority under the provisions of Article XII of the Agreement.

All other terms, rates and conditions as provided in the Agreement shall apply to the employees and the contractor.

Employees who have established seniority under the provisions of Article XII of the Agreement shall be permitted to exercise their seniority on such jobs provided the employee is unemployed or becomes unemployed during the period that a contractor is engaged by the Company and all rates, terms and conditions as provided in the Agreement shall apply.

The Company agrees to establish and supervise a payroll for each contractor and such employees for the duration that such a contractor is engaged.

In 1975 the LSWU and Dryden agreed that the Ear Falls Contracting situation fell within this provision. An agreement was reached with regard to the application of the LSWU collective agreement, confirmed by a letter to the LSWU from Dryden dated March 3rd, 1975 which stipulated, among other things, that Dryden would be responsible for collecting dues from Ear Falls Contracting employees to remit to the LSWU and that Ear Falls Contracting would submit a monthly payroll to Dryden for Dryden to supervise their pay rates. Early in his testimony, Mr. Crawford told the Board that Ear Falls Contracting employees were covered by the terms and conditions of the then existing LSWU collective agreement and that dues were deducted. However, Ear Falls Contracting employees did not acquire seniority under the LSWU collective agreement and did not appear on the Dryden seniority list. At some subsequent point, Ear Falls Contracting began remitting dues directly to the LSWU. Dryden advised the LSWU that if there were any problems collecting dues, Dryden would take over. There is no suggestion that there was a separate collective agreement in effect between LSWU and Ear Falls Contracting at any time. This arrangement was continued by Great Lakes until the spring of 1987.

6. The second contractor, Esker, was formed in 1980 to engage in cut and skid operations and some road maintenance in the Red Lake area. Initially, Esker paid employees and provided benefits directly, but unspecified problems arose in this regard and shortly after its inception, all Esker employees were placed on the Great Lakes payroll although they apparently continued to work under the name of Esker. This situation continued until the spring of 1987. The terms and conditions of the LSWU collective agreement with Great Lakes were also applied to these employees and dues were deducted from them. These employees are listed on the Great Lakes seniority list. Again, there was no suggestion that a separate collective agreement between Esker and the LSWU existed.

7. Kirouac hauls wood for Great Lakes and employs truck drivers and loader operators in this regard. The terms and conditions of the Great Lakes and predecessor collective agreements with the LSWU have been applied to Kirouac employees and dues deducted and remitted to LSWU by Kirouac at least since 1978. Kirouac employees are not on the Great Lakes seniority list. They receive retroactive pay at the same time individuals employed directly by Great Lakes do, after the negotiation of the Great Lakes collective agreement with the LSWU. The LSWU initially claimed in these proceedings that dues were remitted to it as a result of a pick-up agreement signed in 1971 with Kirouac, applying the Dryden-LSWU collective agreement to employees nominally employed by Kirouac. When it emerged that the pick-up agreement in question actually incorpo-



rated the terms of a Ontario-Minnesota Pulp and Paper Company Limited (now Boise-Cascade Canada Ltd.) collective agreement and was operative on the limits of that company, the LSWU took the position that it had a verbal agreement with Great Lakes similar to that of the Ontario-Minnesota pick-up agreement, applying the Great Lakes collective agreement with respect to Kirouac.

8. In addition to the employees directly employed by Great Lakes to do harvesting and cut and skid operations, and those of the three contractors, Great Lakes also had employees represented by CPU in the woodlands prior to 1987, including mechanics, welders, heavy equipment operators, truck drivers and others. Some truck drivers were included in the LSWU unit and some were included in the CPU unit pursuant to an agreement in 1961 with respect to work jurisdiction, in which it was agreed the truck drivers working on Great Lakes equipment fell within the CPU unit, and those working on equipment owned by contractors or by the employee himself were within the jurisdiction of the LSWU.

9. In the spring of 1987, Great Lakes decided that the contractors' presence in the Ear Falls and Red Lake areas meant that it had what amounted to double administration, and it decided to close down three commuter camps of harvesting and cut and skid employees employed directly by Great Lakes and transfer the work to Ear Falls Contracting and Esker. Some 84 employees of Great Lakes were also transferred to Ear Falls Contracting or Esker payrolls. Mr. Crawford testified that at that time, Great Lakes considered two methods of ensuring that the transferred employees would continue to be covered by the LSWU collective agreement: the first was to keep the Great Lakes emblem on their paycheques, and the second was to keep the transferred employees on the Great Lakes seniority list, maintaining their respective positions. Great Lakes eventually decided upon the second option. In addition, a garage in the area was closed and employees who had formerly been represented by the CPU were either transferred to other positions in the CPU bargaining unit in Dryden, or became employees of Esker or Ear Falls Contracting. The change was described by Mr. Crawford with respect to Ear Falls as being a "management change" and "not a big people shuffle". Ear Falls Contracting took over Great Lakes employees, equipment and supervisors. The evidence was that the different groups of individuals who had become employees of Ear Falls Contracting at different times in its history worked side by side, were supervised together and were treated in the same manner with respect to terms and conditions of work. Fred Miron, president of Local 2693 of LSWU, described the three contractors as essentially providing a supervisory function for Great Lakes. Dues continue to be deducted from the wages of employees of Ear Falls Contracting, Esker and Kirouac, although there was some dispute as to whether dues were deducted from the wages of former CPU members hired by Esker and Ear Falls Contracting. Mr. Miron maintained that dues were not remitted to the LSWU for these employees, but Gerald Woolsey, a former CPU member hired by Ear Falls Contracting, produced pay stubs between May and November of 1987 which indicated that union dues were deducted for the LSWU. Not surprisingly, Mr. Woolsey was under the impression that the Ear Falls Contracting LSWU steward represented him as well.

10. Mr. Crawford and Mr. Miron testified between them that if there were any problems with respect to the administration of the LSWU collective agreement regarding Esker or Ear Falls Contracting employees, Great Lakes would resolve them. If a dispute arose, Esker and Ear Falls Contracting employees could file grievances under the Great Lakes collective agreement and they would be handled at the fourth step by the Great Lakes woodlands manager. Similarly, Mr. Crawford testified that if LSWU wished to complain that Kirouac employees were not receiving proper wages and benefits or that dues were not being deducted, it could grieve under the Great Lakes collective agreement and Great Lakes would see to it that employees were being paid properly or that dues were deducted, as the case might be.

11. We have used the term "employee" somewhat loosely here to identify those nominally employed by each of the contractors and those directly employed by Great Lakes. However, it should be noted that although there was some suggestion by Great Lakes at certain points in the proceedings that some of the disputed employees nominally employed by contractors were not employees of Great Lakes within the meaning of the *Labour Relations Act*, an allegation in this regard was eventually withdrawn. As a result, this issue was not disputed. Consequently, we have not recited the evidence which originally appeared to have been directed at that issue.

12. In the circumstances described above, the CPU took the position that all employees of the three contractors were included within the Great Lakes bargaining unit. The IWA, the LSWU and Great Lakes were of the view that the evidence demonstrated a past practice supporting the following interpretation of the recognition clause:

(a) Of employees employed by Ear Falls Contracting prior to the spring of 1987, only the tractor operators were included in the bargaining unit.

(b) Of the employees transferred into Ear Falls Contracting after the closure of the commuter camps and garage in the area, the employees who had worked in the commuter camps were included in the bargaining unit, but those who had been formerly in the CPU bargaining unit were not.

(c) All employees employed by Esker prior to the spring of 1987 were included in the bargaining unit, together with all employees subsequently transferred into Esker in 1987 with the exception of those employees formerly represented by the CPU.

(d) No Kirouac employees were included in the bargaining unit.

13. Turning to the question of whether the recognition clause is ambiguous, counsel for the CPU pointed out that all employees of contractors without exception were deemed to be employees within the terms of the collective agreement by virtue of Article 3.01(b). However, the IWA, the LSWU and Great Lakes were of the view that the portion of Article 3.01(b) which reads "[t]he employees of contractors engaged by the company on the limits and work sites of the company shall be considered employees within the terms of this agreement" must be qualified by the statement in Article 3.01(a) that "[f]or purposes of this article, company employees shall be those employed in the job classifications set out in the wage schedule attached to and forming part of this agreement, including those who are employed on job classifications which may be established and become part of the attached wage schedule during the term of this Agreement". When Article 3.01(a) and 3.01(b) are read together, these parties argue that only those employees of contractors who fall into the job classifications set out in the wage schedule fall within the bargaining unit.

14. While that interpretation has some merit, it is not consistent with the position in support of which it is being invoked. For example, the parties conceded that all Kirouac employees work in classifications included in the Great Lakes collective agreement wage schedule. On this interpretation, all Kirouac employees should be included in the bargaining unit, contrary to the position taken by the IWA, the LSWU and Great Lakes. We do find, however, that this argument suggests some ambiguity with respect to Article 3.01(b), and for this reason we find it useful to turn to the parties' past practice.

15. Having reviewed that evidence, we are far from convinced that the past practice supports the anomalous position taken by the IWA, the LSWU and Great Lakes. In fact, we find that the evidence indicates that the terms and conditions of the Great Lakes-LSWU collective agree-



ment have been applied to all the employees of the three contractors, that those employees could grieve under the Great Lakes collective agreement and that dues have been deducted or remitted to the LSWU on their behalf. While there may be some inconsistencies, for example, with respect to the deduction of dues for former CPU members and while some of the arrangements made with the contractors were somewhat novel, on balance, the evidence indicates that all employees of the three contractors were treated in all essential respects as falling within the bargaining unit. The explanation that dues were deducted from Kirouac employees as a result of a verbal pick-up agreement was not supported by any reliable evidence. And the fact that some of these employees do not have seniority standing is not particularly significant in light of the 1966 provision set out earlier, which clearly contemplates employees being included within the ambit of the collective agreement without being accorded seniority. We cannot agree that the 1966 provision suggests that employees to which it is directed do not come under the collective agreement at all. The preamble “[c]ertain understandings regarding Article III - Recognition and Jurisdiction of the Agreement (Re: 3:01(b) Contractors) agreed to hereunder” makes it clear that these provisions are intended to be read as an elaboration or clarification of Article 3.01(b). We read the second paragraph of the 1966 provision together with Article 3.01(b) to the effect that employees of contractors deemed to be employees under the collective agreement as a result of Article 3.01(b) will not acquire seniority when the contractor is engaged in hauling operations or road construction. For similar reasons, we reject the contention that the only employees in the bargaining unit are those on the seniority list. While the seniority list might be a useful indicator with respect to the parameters of a bargaining unit in other circumstances, it is not in the presence of the 1966 provision.

16. Counsel for the IWA and the LSWU admits that the practice claimed is anomalous. However, he urges us to find that this is the understanding that the LSWU and Great Lakes have themselves evolved over the years and that we should not tamper with the existing “ecology” of the situation, particularly when it intersects with arrangements made by the parties with respect to the work jurisdiction of the LSWU and the CPU. While this is an argument that has considerable merit, the Board is neither interested in nor required to disturb the arrangements the parties to the LSWU collective agreement have made. What the Board is called upon to do here is to characterize legally what those arrangements have been, and in coming to that conclusion, we cannot simply accept the assertions of the parties to the collective agreement at face value. We do not think that we can ignore, for example, that the LSWU has been collecting dues in some cases for the last 12 years for employees it now asserts that it does not represent. In addition, we note that some of the arrangements described date back only several months to the spring of 1987.

17. We conclude that to the extent that Article 3.01(b) can be considered ambiguous, the past practice of the LSWU supports the CPU’s interpretation. As a result, we find that all of the disputed employees fall within the bargaining unit set out in the collective agreement. Having regard to the principle enunciated in *Milltronics*, *supra*, we further find that, pursuant to section 9(4), that bargaining unit is a unit appropriate for collective bargaining and we direct that all the ballots taken in the Great Lakes representation vote be counted.

18. Turning to the issue of our discretion under section 103(3), it is evident that the two applications with respect to Kirouac are redundant at this point. We have found the employees involved to be part of the Great Lakes bargaining unit and all three unions in the Kirouac application were listed on the Great Lakes ballot. Since the ballots of Kirouac employees taken in the Great Lakes representation vote will now be counted along with the others, there is no purpose or justification for entertaining the Kirouac applications which were subsequent in time to the Great Lakes applications. As a result, we decline to entertain those applications pursuant to section 103(3)(c). The Registrar will destroy the ballots cast in the Kirouac vote following the expiry of 30



days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiry of such 30 day period.

19. This matter is referred to the Registrar.
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**2796-87-G Labourers' International Union of North America, Local 183, Applicant v. Greenleaf Designs Ltd., Respondent**

**Construction Industry Grievance - Practice and Procedure - Settlement - Minutes of settlement indicating that Board should "issue an order" - Parties must make clear which matters are to be the subject of an order - Board declining to make order**

**BEFORE:** *G. T. Surdykowski*, Vice-Chair, and Board Members *H. Kobryn* and *W. A. Correll*.

**DECISION OF THE BOARD;** February 10, 1988

1. This is a referral to the Board of a grievance pursuant to section 124 of the *Labour Relations Act*. The parties have executed Minutes of Settlement, filed, as follows:

File #2796-87-G

B E T W E E N:

Labourers' International Union of North America, Local 183,

Applicant,

- and -

Greenleaf Designs Ltd.,

Respondent.

WHEREAS the parties have met and agreed to resolve this matter in the following Minutes of Settlement.

1. The Respondent acknowledges it is bound to the collective agreement between Greenleaf Designs Ltd. and L.I.U.N.A. Local 183 effective September 15th, 1987 until September 15, 1988.
2. The Respondent acknowledges that it has violated the collective agreement and further agrees to cease and desist said violation immediately.
3. The Respondent agrees to pay to L.I.U.N.A. Local 183 and its trust funds [sic] an amount of One Thousand Six Hundred and Sixty-two Dollars and Fifty cents. (1,662.50) because of said violation.
4. The parties request that the Board endorse these Minutes of Settlement and further issue an Order of the Board.

Signed this 4th of February, 1988 at Toronto.

"Nick Carlascio"  
For the Respondent

"Frank Spers"  
For the Applicant

2. The Minutes of Settlement do not indicate that the parties have agreed that the Board should make any particular declarations or orders. They merely indicate an agreement that the Board "endorse these Minutes of Settlement and further issue an order ...". The Board has previously commented on this sort of request in *Consolidated Aluminium (Maritimes) Ltd.*, [1987] OLRB Rep. Mar. 350:

3. As there seems to be some confusion on the point, we think it important to note that the Board does not "endorse" Minutes of Settlement in the sense of approving them or lending them some legal effect they do not already have as a result of the parties' having entered into them. The Board will "endorse the record" with Minutes of Settlement by reproducing the text of the Minutes of Settlement in the decision by which it disposed of the matters settled, as we have done in paragraph 2 of this decision. If the parties have expressly agreed that the Board should issue a particular declaration, direction or order, and if the Board has the jurisdiction to do so, the Board will "endorse the record" in accordance with that particular agreement by including the agreed upon declaration, direction or order in its decision disposing of the matters settled. In the past, the Board might have converted the language of settlement agreements into specific Board orders in response to requests "that the Board endorse the record with these Minutes of Settlement", "that these Minutes of Settlement be issued as a decision of the Board", "that the Board issue the appropriate orders" and other equally general and ambiguous language. Generally speaking, it will no longer do so: see *Elmont Construction Limited*, [1987] OLRB Rep. Feb. 209 and *N. D. Barbeau Mechanical Limited*, Board File 0393-86-M, dated February 23, 1987, unreported.

4. Recognizing that there are differences, both legal and otherwise, between agreeing to do something and agreeing to be ordered to do it, and that settlement agreements can result in contractual obligations which could not be the subject of an order by this Board, the Board will not interpret mere agreement that the Board "endorse the record" with the Minutes of Settlement as licence or implied authority to convert the terms of Minutes of Settlement into declarations, directions or orders. The Board will only make a declaration, direction or order if there is *express* agreement that it do so and, even then, only if the Board has the jurisdiction to do so. Participants in the settlement of referrals under section 124 would be well advised to purge the phrase "endorse the record" from the language in which they couch Minutes of Settlement. When Minutes of Settlement recite that proceedings are thereby settled, but do not expressly provide that the Board make particular declarations, directions or orders, the only order the Board will make is an order terminating the proceedings.

3. Those observations are apposite to this situation. If the parties to proceedings before the Board settle the matter, they should specify what declarations or orders, if any, they wish the Board to issue. No particular words are required and the degree of precision required will depend on the circumstances. What is important, is that the parties make clear which matters are to be the subject of declarations or orders of the Board. In our view, the parties have, at most, asked the Board to set out the terms of their agreement in a decision. Accordingly, the Board declines to make any declarations or orders.

4. Having regard to the settlement between the parties as aforesaid, these proceedings are terminated.

**1237-87-M Vernon John Hermer, Applicant v. Canadian Union of Public Employees, Respondent**

**Employee Reference - Individual referring question of whether he was an employee or an independent contractor - No question arising between the bargaining unit parties - Section 106(2) not available to the applicant**

**BEFORE:** S. A. Tacon, Vice-Chair, and Board Members D. A. MacDonald and B. L. Armstrong.

**DECISION OF THE BOARD;** February 11, 1988

1. The applicant's name in the style of cause is hereby changed to "Vernon John Hermer".
2. This is an application under section 106(2) of the *Labour Relations Act*.
3. The applicant is an individual seeking a 106(2) determination for the following reasons:

July 29, 1987

Ontario Labour Relations Board,  
400 University Avenue,  
4th Floor,  
Toronto, Ontario,  
M7A 1V4

Attention: The Registrar

Dear Sir:

Re: Vernon John Hermer  
Section 106 (2) Reference

Pursuant to Section 106 (2) of the Labour Relations Act, Mr. Vernon Hermer is referring to the Board the question of whether he was an employee of the Frontenac County Board of Education and not an independent contractor for the period from September 1, 1985 to December 4, 1986. Mr. Hermer was the caretaker/custodian at Clarendon Central Public School for that period of time, and during that time custodians/caretakers employed by the Frontenac County Board of Education were governed by a collective agreement with the Canadian Union of Public Employees.

Mr. Hermer performed certain set tasks daily as required and recorded this in a log book at the Clarendon Central Public School. His work was regularly checked by the Principal of the school, and all cleaning equipment and supplies were provided for Mr. Hermer.

Mr. Hermer is referring this question to the Board at this time, although his position was terminated by the Frontenac County Board of Education as of December 4, 1986, because it was only recently that Revenue Canada Taxation denied an appeal from the Frontenac County Board of Education and upheld the decision that Mr. Hermer was an employee of the Frontenac County Board of Education for purposes of the Canada Pension Plan and the Unemployment Insurance Act. If Mr. Hermer were found to be an employee by the Ontario Labour Relations Board, he would then be in a position to take advantage of some of the terms of the grievance procedure under the collective agreement.

Mr. Hermer did not previously apply to this Board for a determination that he be found to be an employee, as he was not aware of this procedure. He advises that on two occasions he inquired from the Supervisor of Operations and Caretaking Services for the Frontenac County



Board of Education if he could join the union, but on both occasions was advised that he could not because he was an independent contractor.

Mr. Hermer has retained me to act for him in this matter, as you will note from the enclosed authorization. We would ask that a Labour Relations Officer be appointed to make inquiries in this reference.

If you have any questions, please do not hesitate to contact me.

Yours very truly,

"Mary M. McCormick"  
Barrister and Solicitor

MM:er  
Encl.

c.c. Vernon Hermer

4. It is also useful to set out the position of the respondent trade union:

January 19, 1988.

Ontario Labour Relations Board,  
400 University Avenue,  
Toronto, Ontario,  
M7A 1T7

Attention: Ms. V. Robeson,  
Registrar

Dear Ms. Robeson:

Re: Board File # 1237-87-M  
Frontenac County Board of Education  
and  
The Canadian Union of Public Employees  
Section 106(2) of the Act

We acknowledge receipt of your letter dated January 8th, 1988 and received in this office January 12th, 1988.

We wish to advise the Board that we are opposed to the assignment of an Officer under Section 106(2) of the Act in this particular case. In the bargaining relationship between the Frontenac County Board of Education and the Canadian Union of Public Employees a small number of schools were contracted out to private contractors. Claredon Central Public School was one of the schools that was cleaned by private arrangement thus, Mr. Hermer was never a member of the bargaining unit.

Since Mr. Hermer is no longer a contractor with the Frontenac County Board of Education it is the position of CUPE that Section 106(2) should not be used for determining whether or not Mr. Hermer was an independent contractor.

As there is no dispute between the Employer and the Union as to employee status there is therefore no need for an investigation of status under Section 106(2) of the Act.

Yours truly,

"Helen O'Regan"

HELEN O'REGAN  
National Representative  
CANADIAN UNION OF PUBLIC EMPLOYEES.

5. Section 106(2) of the Act reads:

(2) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

6. In it appropriate at this juncture to set out the following passage from *Central Park Lodges of Canada*, [1980] OLRB Rep. Oct. 1373 wherein the Board rejected an application by persons whom the employer (by virtue of its position in an earlier Board proceeding) and the trade union agreed were employees within the meaning of the Act:

15. The contention of the applicant in the present case has been considered and rejected in at least three previous Board cases. In *Wallace Barnes Limited* 61 CLLC ¶16,198, an employee claimed that she had been improperly discharged and that by virtue of section 1(2) of the Act [which provides that a person does not cease to be an employee by reason of a discharge contrary to a collective agreement] and 95(2), the Board has jurisdiction to determine whether she was still an employee. In dismissing the application the Board commented:

"In sum, then, it appears to us that when the Legislation is looked at as a whole section 68 [now section 95] subsection 2, is designed to deal with questions which may arise between the parties who are negotiating a collective agreement and between the parties to a collective agreement during its operation. Moreover, in our view, it was never intended that employees should be able to refer a question under section 68(2) to the Board but rather this was to be left to one or more of the parties to the agreement. While in a sense employees in the bargaining unit are parties to a collective agreement, since a trade union acts as their bargaining agent, having chosen that agent to act on their behalf they are bound by its actions and, if a collective agreement exists, by the terms of that collective agreement."

In *Indusmin Limited* [1975] OLRB Rep. March 184, a request by individual employees for a determination of their status was also rejected. Finally, in *York University* [1978] OLRB Rep. August 790, the Board dealt with a situation in which a group of employees alleged that they were "guards", and thereby excluded from a bargaining unit because of section 11 of *The Labour Relations Act*. As in the present case, neither the union representing them, nor their employer regarded them as "guards" and it was acknowledged that they had been treated as employees by the parties' collective agreement. In dismissing the application, the Board had this to say:

"In our view there must be a present question arising between the parties to the collective bargaining relationship before there can be a section 95(2) referral. Certainly, it is clear that for a question to arise "in the course of bargaining for a collective agreement" it could be necessary for such question to be raised in the "bargaining forum" and must therefore be a question between the parties to that bargaining relationship i.e. the bargaining agent and the employer; we are of the opinion, that it is no less implicit in the language of the section that the question which must arise during the period of operation of the agreement must also be a question between the parties to that agreement."

16. In *York University*, the Board found that the "guard's exclusion" was intended to protect the interests of the employer, since the inclusion of guards in the bargaining unit might generate a conflict of interest with respect to the protection of the company's property. Section 95(2), in

turn, was “intended to promote the stability of labour relations by making available a forum for the settlement of particular questions, where there [sic] are interfering with the general collective bargaining relationship”. Where the parties had agreed that the employees in question were not “guards”, there was no interference with the collective bargaining relationship; and where the company itself had treated the alleged guards as ordinary employees, the Board saw little likelihood of subverting the interests which section 11 was designed to protect. In the result, the Board found that section 95 was restricted to question which arose *between the parties*, at the bargaining table, or pursuant to the administration of the collective agreement.

17. In our view, the scheme of the Act, the decided cases, and the ramifications of an alternative interpretation, all support the inference that section 95(2) was only intended to resolve disputes between the immediate parties to the bargaining relationship. Section 1(3)(b) is designed to protect the institutional interests and integrity of the bargaining parties; but no such interests are at issue here, and it is unlikely that the mischief to which section 1(3)(b) is directed would arise where the company and the union have mutually agreed on the distribution of “managerial” authority, the composition of the “managerial team”, and the scope of the bargaining unit. Indeed, if the parties have been able to reach such agreement, there are good policy and practical reasons why it should not be disturbed. It would not further a stable collective bargaining relationship if the parties could be plunged into litigation on matters which they have already settled - even though an individual employee may be dissatisfied with that settlement. Moreover, it seems strange, from a practical point of view, to suggest that the Board should be entertaining applications brought for the purpose of demonstrating that a company has more (or fewer) managers than either it or the employees’ bargaining agent think it has. We agree with the view expressed by the Board in *York University, supra* that it is implicit that a “question” arising during the negotiation of a collective agreement must involve a question *between the bargaining parties* which must be resolved in order to assist them to reach a collective agreement; and that it is also implicit that a “question” arising during the operation of the collective agreement, is intended to refer to disputes between the parties who have a responsibility for administering that agreement (i.e. the trade union and the employer). Having carefully considered the various submissions of the parties, we are satisfied that section 95 was only intended to resolve issues between the bargaining parties; and was not intended to provide a forum in which employees could question their status when that status was not a matter of dispute between their employer or their trade union. In our view, it is implicit that the “question” to which section 95 refers must involve a question arising between the bargaining parties during the negotiating or operation of the collective agreement.

[Section 95(2) of the Act referred to above is now section 106(2).]

7. The instant case deals not with the contrast between an “employee” and the “managerial” exclusion but between the applicant’s status as an “employee” or “independent contractor”. The applicant, however, is an individual; no “question” has arisen between the bargaining parties. The Board affirms the rationale expressed in *Central Park Lodges, supra*, and the cases cited therein with respect to the purpose of the statutory provision. Accordingly, the Board finds that the procedure in section 106(2) is not available to the applicant.

8. For the foregoing reasons, then, this application is dismissed.

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**2873-87-R** Labourers' International Union of north America, Local 183, Applicant v. **Labour Council Development Foundation**, Respondent v. United Brotherhood of Carpenters and Joiners of America, Local 27, Intervener

**Certification - Construction Industry - Practice and Procedure - Intervention filed by union requesting a hearing on the basis that it represented employees who might be affected by the application - Board declining to hold a hearing - Intervener not pleading any material facts on which it relies nor indicating relief requested - Certificates issuing**

**BEFORE:** *Harry Freedman*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw*.

**DECISION OF THE BOARD;** February 11, 1988

1. In this application for certification the applicant filed one combination application for membership and receipt. The combination application for membership is signed by the employee and the receipt is countersigned and indicates that a payment of \$1.00 has been made within the six-month period immediately preceding the terminal date of the application. The applicant also filed five certificates of membership. The certificates are signed by the members and indicate that monthly dues of at least \$11.00 have been paid for at least one month within the six month period immediately preceding the terminal date of the application. The certificates are checked and certified correct by an officer of the applicant. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.

2. The respondent filed a reply, a list of employees containing seven names on Schedule "A" and specimen signatures for six of the seven persons listed on the schedule of employees within the time fixed in accordance with the *Labour Relations Act* and the Board's Rules of Procedure.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 18, 1986 the designated employee bargaining agency is Labourers' International Union of North America and the Labourers' International Union of North America Ontario Provincial District Council.

4. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

5. The Board further finds, pursuant to section 144(1) of the Act, that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

6. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on February 5, 1988, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

7. The intervener, by its solicitors, filed an intervention in Form 83 in which it asserted that it represents employees or is the bargaining agent of employees who may be affected by this application. It submitted no documentary evidence whatsoever with its intervention. The intervener requested a hearing of this application and in support of its request stated:

“The intervener may represent employees who are subject to the application, and its interest may be directly affected by the application.”

8. Section 97 of the Board's Rules of Procedure state:

“Where a party requests a hearing of the application by the Board, he shall set out in the application, reply or intervention, as the case may be, a concise statement of,

- (a) the material facts upon which he proposes to rely at the hearing;
- (b) the relief to which he claims to be entitled by reason of such facts; and
- (c) the submissions he proposes to make in support of his claim for relief.”

Item 5 of the notes and comments on the intervention form filed by the solicitors for the intervener specifically directs the attention of the intervener to the provisions of section 97 of the Board's Rules of Procedure. It is clear that the intervener has not set out any material facts upon which it relies, nor does it indicate the relief sought.

9. Section 102(14) of the *Labour Relations Act* allows the Board to dispose of an application for certification made under the construction industry provisions of the Act without convening a hearing of the application. Generally, the Board exercises its discretion to deal with an application for certification made under the construction industry provisions of the Act without a hearing where there are no factual issues in dispute relevant to the disposition of the application and where it is unnecessary, in the Board's view, to receive oral argument. In this case, the intervener has not pleaded any material facts upon which it relies nor does it indicate what relief it is seeking from the Board in respect of this application. In these circumstances, the Board considers it unnecessary to convene a hearing and the Board can proceed to dispose of the application before it based on the material filed.

10. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

... the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 3 above in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

11. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of the respondent in all other sectors of the construction industry, except the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman.

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**1774-87-JD International Union of Operating Engineers, Local 793, Applicant v. Labourers' Ontario Provincial District Council and Labourers' International Union of North America, Local 607 and Marine-Hamlyn Joint Venture, Respondents**

**Jurisdictional Dispute - Practice and Procedure - Material filed by parties prior to pre-hearing conference inadequate - Board requiring compliance with Rules and Practice Note**

**BEFORE:** *R. O. MacDowell*, Alternate Chair and Board Members *J. A. Rundle* and *J. Sarra*.

**APPEARANCES:** *Jack J. Slaughter, Richard Kennedy* and *Patrick Maley* for the applicant; *Lorne Richmond* for Labourers' Ontario Provincial District Council and Labourers' International Union of North America Local 607; *Carl Peterson* for the respondent Marine-Hamlyn Joint Venture.

**DECISION OF THE BOARD;** February 22, 1988

# I

1. The Labourers' Ontario Provincial District Council is hereby added as a party to these proceedings.

2. This is a jurisdictional dispute filed pursuant to section 91 of the *Labour Relations Act*. The complainant union ("Local 793") and the respondent union ("Local 607") each claim certain work. For present purposes the precise nature of that work need not be defined. It suffices to say



that both unions claim it as their own, and seek a Board direction requiring that it be assigned to their respective members.

3. This complaint was filed on September 30, 1987. Rule 60 of the Board's Rules of Procedure (respecting jurisdictional disputes) provides as follows:

A complainant shall file together with his complaint, and every person served with a notice of application shall file together with his reply,

- (a) any union constitution;
- (b) any collective agreement;
- (c) any agreement or understanding between trade unions as to their respective jurisdictions on work assignment;
- (d) any agreement or understanding between a trade union and an employer as to work assignment;
- (e) any decision of any tribunal respecting work assignment; and
- (f) any other document,

relating to the work in dispute which may be in his possession and upon which he proposes to rely in support of his claim for relief or his claim that the relief requested should not be granted, as the case may be, and a statement as to any area or trade practice relating to the work in dispute, and pictures, diagrams or drawings of the disputed work.

The complainant has not filed any union constitution, collective agreement, understanding between the unions respecting their work jurisdictions, the decision of any tribunal, or any other document relating to the work in dispute. Nor is there any useful statement as to area practice, or pictures, drawings or diagrams relating to the disputed work.

4. The respondent Local 607 filed a reply on November 16, 1987. The reply consists of a bald claim to the work in dispute "on the basis of the Board's criteria in determining complaints concerning work assignments". There were no supporting documents, union constitutions, collective agreements, etc. The reply was filed beyond the time prescribed in the Board's Rules.

5. Initially, the respondent employer filed no reply at all. Its reply did not surface until the pre-hearing conference which the Board eventually scheduled. The employer's reply identifies two entities known as the "Utility Contractors Association" and the "Pipeline Contractors Association of Canada" which the respondent employer claims may be affected by the complaint. There is no address for service for these bodies. There is no supporting documentation of the kind contemplated by Rule 60.

6. The Board's Rules contemplate the extension of time for the filing of material. A request for the extension of time which did not unduly prejudice other parties, or would, objectively, likely "save time in the end", would be viewed favourably by the Board and would, more likely than not, enlist the agreement of the other parties. Here there was no request to extend the time limits, even though, at the pre-hearing conference, counsel said they had difficulty, during this season, in gathering complete information from their northern advisors.

## II

7. The Board's approach to the resolution of jurisdictional disputes has now been "formalized", and is expressed in Practice Note 15 which reads as follow

## JURISDICTIONAL DISPUTE COMPLAINTS

1. The Board has adopted a pre-hearing conference procedure for jurisdictional disputes heard by the Board under section 91 of the *Labour Relations Act*. By this procedure, the factual and legal issues in the complaint can be identified and agreements reached upon matters not in dispute, thereby reducing the hearing time required for the case and the related expense to the parties. The conference can also be of assistance in facilitating settlement discussions.

2. The Board will normally convene a pre-hearing conference before a Vice-Chairman of the Board within twenty-eight days of the receipt of the complaint. However, where a strike is imminent, and consultation pursuant to section 91(8) takes place, the pre-hearing conference will normally be convened at a later date. At that pre-hearing conference, the Board expects the parties to be prepared to discuss the identification and simplification of the issues in the case, the number of days required for hearing and the fixing of a date or dates and a place for hearing and to agree to facts or other matters, not in dispute in order to facilitate the expeditious hearing of the complaint. The Vice-Chairman conducting the conference will not be a member of the panel hearing the complaint on its merits.

3. The parties are required to file their replies or interventions in accordance with the Board's Rules. Particular regard should be had to the requirements of Rule 60 which provides:

...

4. Where a hearing continues to be necessary following the pre-hearing conference, the Vice-Chairman convening the conference shall certify to the Registrar all agreements reached by the parties. Each party must file a pre-hearing brief seven days prior to the hearing which contains a concise statement of the issues in dispute, including a detailed description of the work in dispute, and the party's understanding of the material facts upon which it intends to rely. Should a party fail to file the required reply or intervention and pre-hearing brief, or fail to attend the pre-hearing conference, the Board may refuse to permit that party to adduce evidence at the hearing of any material fact not disclosed in the filings or at the pre-hearing conference.

5. Any party disputing the jurisdiction of the Board to deal with the complaint should notify the Board and the other interested parties at least ten days prior to the scheduled pre-hearing conference. Such notification must include a statement of the material facts upon which that party intends to rely to dispute the jurisdiction of the Board to hear the matter. Upon receipt of such notice, the Board will normally advise the parties that it will use the date and time scheduled for the pre-hearing conference as a hearing before a panel of the Board to deal with the issue of the Board's jurisdiction to entertain the complaint.

6. It is expected that this procedure will help to simplify jurisdictional dispute complaint hearings before the Board, and will facilitate the expeditious resolution of these complaints by the Board.

8. In accordance with Practice Note 15, the Board scheduled a pre-hearing conference in this case in order to explore the dimensions of this dispute, and canvass the possibility of narrowing the questions which would have to be litigated. The notice of pre-hearing conference from the Board's Registrar contains the following:

It is the intention of the Board to convene a pre-hearing conference before a Vice-Chairman of the Board in an attempt to narrow and identify the issues in dispute. The parties are requested to file, prior to this conference, a brief containing a concise statement of the issues in dispute as well as the parties' understanding of the facts pertinent thereto.

9. None of the parties filed briefs *prior* to the pre-hearing conference, and those briefs filed *at* the pre-hearing conference were decidedly “thin” and not particularly helpful. It was evident that the parties in this matter had either not turned their minds to the Rules, the Practice Note, and the Registrar’s letter, or, alternatively, having done so, had decided to ignore all three. In the circumstances, the scheduled pre-hearing conference was a complete waste of the Board’s time, and the public’s money. It was little more than a forum for the exchange of documents which should have been exchanged earlier.

10. In response to questions from the Board about why the required material had not been filed, we were told that, in the past, the Board has been rather lax about requiring compliance with its Rules. We were told that the Board has not required strict adherence to its Practice Note. We were told that the Board has not obliged parties to comply with the filing requirements outlined in the Registrar’s letter. We were told that the Board has always accepted material which was incomplete, filed late or otherwise did not comply with the Rules. We were told that the Board has not invoked the sanction of declining to consider the evidence of a party that fails to follow the prescribed procedure, nor, until recently, has it even been disposed to make explicit directions with respect to filings and pre-hearing discovery. And, as counsel for Local 607 so candidly put it: “Why should my client fully disclose its case if the other parties are not required to do so. If I do disclose my case in its entirety, the other parties may gain a tactical advantage, and tailor their pleadings and briefs according to what I have identified my position to be.”

11. He is quite right of course. Whatever one might think of this “hide and seek” approach to litigation, if the Rules are to be applied, they must be applied even-handedly. There must also be well-recognized consequences for non-compliance. Otherwise, there might as well be no Rules at all.

### III

12. Section 91 of the Act is framed in very broad terms. It permits a union to press a claim for work even though that union has no collective bargaining relationship with the employer or employees doing the work in question, simply because work of that kind, or similar work, has been done by that union’s members in the past. The result has been a multiplication of the number and complexity of the cases brought before the Board under section 91.

13. Against this background, it is the opinion of this panel of the Board, that, where the Board has determined that it will embark on a jurisdictional dispute enquiry, its own Rules and Practice Note should be applied. The parties and the Board are entitled to pleadings which pinpoint the areas of factual or legal controversy, as well as those areas upon which the parties are in substantial agreement. Where necessary, a panel of the Board may also consider it appropriate to make additional directions in order to facilitate the orderly and expeditious resolution of the issues put before the Board for determination. There is no room in this equation for approaches which reward one party or another’s disregard for the Rules in the hope of a tactical advantage.

14. We recognize, of course, that in preparing their briefs for a pre-hearing conference, one or more of the parties may not be in a position to make any definitive statement, for example, about “area practice”, simply because that party may not have access to all of the relevant information. The material before the adjudicative panel may (and, if ordered, *should*) be more complete than that before the Board Vice-Chair conducting the pre-hearing conference. And if more time is needed to assemble the necessary material, a party should, if only as a matter of courtesy, alert both the Board and the other litigants of that problem. Nevertheless, this practical reality is no excuse for a complete disregard of the Board’s Rules and Practice Note. Whatever laxity there has been in the past, it is the opinion of this panel of the Board that it should not be continued.



15. Since the sentiments expressed in this decision were expressed by this panel of the Board in open hearing, we do not think any procedural directions are now necessary.

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**2484-87-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. Masters Construction Ltd., Respondent**

**Certification - Construction Industry - Intimidation and Coercion - Unfair Labour Practice - Whether persons not legally employed in Canada ought to be considered employees under the Act - Status of persons under the *Immigration Act* irrelevant to determination under the *Labour Relations Act* - Persons found to be employees of the respondent - Intimidation by union organizer causing Board to order vote**

**BEFORE:** Harry Freedman, Vice-Chair, and Board Members W. N. Fraser and C. A. Ballentine.

**APPEARANCES:** David Strang for the applicant; J. Wigley and M. Lyle for the respondent.

**DECISION OF VICE-CHAIR HARRY FREEDMAN AND BOARD MEMBER W. N. FRASER;**  
February 5, 1988

1. The name of the respondent is amended to read: "Masters Construction Ltd.".
2. This is an application for certification filed pursuant to the construction industry provisions of the *Labour Relations Act*.
3. The Board finds that Locals 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081 and 1089 are trade unions within the meaning of section 1(1)(p) of the *Labour Relations Act*. The Board further finds that they are constituent trade unions of the applicant.
4. The Board further finds that the applicant is a council of trade unions within the meaning of section 1(1)(g) of the *Labour Relations Act*.
5. The Board is satisfied that the constituent trade unions of the applicant have vested appropriate authority in the applicant to enable it to discharge the responsibilities of a bargaining agent within the meaning of section 10(1) of the *Labour Relations Act*.
6. The Board also finds that the applicant is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on September 30, 1983, the designated employee bargaining agency is The Labourers' International Union of North America and The Labourers' International Union of North America, Ontario Provincial District Council.
7. The Board further finds that this is an application for the certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

144.-(1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

8. Having regard to the agreement of the parties and pursuant to section 144(1) the Board finds that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, and the Regional Municipality of Durham (except for the Towns of Ajax and Pickering) the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen and persons above the rank of non-working foreman constitute a unit of employees of the respondent appropriate for collective bargaining.

9. The parties agreed that there were seven persons working as construction labourers for the respondent on the application date. The applicant filed documentary evidence of membership on behalf of four of those seven persons. Counsel for the respondent submitted that two of those seven persons should not be considered employees of the respondent and any membership evidence filed by the applicant in respect of those two persons should be disregarded. Following the submissions of counsel for the respondent, the Board briefly recessed and returned and gave the following oral ruling:

Counsel for the respondent submits that two persons who were working for the respondent on the application date were not legally employed by reason of section 18 of the Regulations under the *Immigration Act*. Counsel in essence argues that if the two persons cannot be employed legally in Canada, they ought not to be considered employees of the respondent for purposes of this application and if the applicant filed membership evidence in respect of those two persons, that membership evidence should not be considered by the Board. Counsel agreed that in the absence of any consideration of the *Immigration Act* or the Regulations under that Act, the two persons in question were at work and were employed by the respondent on the application date.

In our opinion, the Board should not inquire into whether a person who is employed by an employer is a person who was legally employed under the *Immigration Act*. The Board is not the appropriate place to determine whether someone is lawfully entitled to work in Canada. While we have assumed that these two persons were not lawfully employed, we believe that their status under the *Immigration Act* is irrelevant to our determinations under the *Labour Relations Act*. If a person is employed, then whether that employment is lawful is a matter for other forums or agencies and not ours.

Therefore, we are satisfied that the two persons in question were employees of the respondent at the relevant times and if the applicant filed membership evidence on their behalf, then that membership evidence will be relied on by the Board, subject to the other charges that the respondent has filed about the membership evidence filed by the applicant in this case.

10. The Board subsequently received evidence relating to allegations of misrepresentation and intimidation in the collection of the membership evidence. Only one of the four witnesses called by the respondent in support of its allegations testified that the applicant's organizers told him that if he did not join the applicant he would lose his job. Mr. Rui Gemarais, a construction labourer who is no longer employed by the respondent and who appeared at the hearing to testify pursuant to a summons to witness, said that the two union organizers had spoken to him three times on the same day. They discussed the wage rates that he would be paid and the benefits he would receive through the union. Mr. Gemarais told them that he was not interested in joining the union. The organizers persisted and he was then told that if he did not join the union he would be fired because his employer will only have employees affiliated with the union working for it. Mr. Gemarais then told them that he would speak to his boss about whether he could lose his job if he did not join the union. Mr. Gemarais' evidence was not shaken at all during a rigorous cross-examination by counsel for the applicant.

11. Edward Ferreira, a representative of Local 506 of the Labourers' International Union of North America, a constituent local of the applicant, testified that he had spoken with Mr. Gemarais four times. When he was asked to relate the conversations he had with Mr. Gemarais, he mentioned only three occasions that he had spoken with Mr. Gemarais. Mr. Ferreira denied threatening Mr. Gemarais. Mr. Ferreira did not testify about the contents of the conversations he had with Mr. Gemarais, other than to say that he asked Mr. Gemarais to join the applicant and that Mr. Gemarais had said no. Mr. Ferreira also testified that Mr. Gemarais said he would speak to his boss about the union, which was consistent with the testimony of Mr. Gemarais.

12. The evidence adduced through the respondent's other witnesses indicated that the organizers had told other employees that all of the company's employees had joined the applicant and that they should also join the applicant at this time. They also testified that the organizers had told employees that a foreman had joined the applicant. Counsel for the respondent submitted that these were misrepresentations that affected the employees' ability to freely decide whether or not to join the applicant.

13. The allegations of misrepresentation alone do not cause us to disregard or to have doubts about any of the membership evidence filed. We do not believe that the employees' ability to freely decide whether to join the applicant was in any way affected. The misrepresentations did not relate to the effect or purpose of the membership evidence. The evidence of intimidatory or coercive statements made by the applicant's organizers did not relate to any of the employees except Mr. Gemarais.

14. While we do not accept the respondent's submissions with respect to the allegations of misrepresentation, the allegation of intimidation is another matter. The Board was faced with conflicting evidence as to whether one employee was told that if he did not join the union he would lose his job. This is a matter of credibility that must be resolved on the balance of probabilities. Having regard to all of the usual factors, and also taking into account that Mr. Gemarais was testifying under a subpoena and was, as of the hearing, no longer employed by the respondent, we prefer the evidence of Mr. Gemarais over the evidence of Mr. Ferreira. It is unlikely, in our opinion, that the conversations with Mr. Gemarais only lasted a minute or two as Mr. Ferreira suggested.



Furthermore, we believe it is likely that the wages and benefits available were discussed, yet Mr. Ferreira's testimony did not indicate that. Additionally, there was no apparent reason for Mr. Gemarais to colour his evidence while Mr. Ferreira, being an experienced organizer, was well aware of the consequences should the Board find that a union organizer told an employee that he or she may lose his or her job if he or she does not join the union.

15. Additionally, it seems to us more probable that Mr. Gemarais would speak to his boss about the union if there was some job related concern that he had about the union. Simply being asked to join the union and saying no would not, in and of itself, likely raise a concern which would cause an employee to speak to his or her employer about the union. There was no evidence to suggest that the respondent had in any way communicated with the employees about the union or what consequences might result from joining the union before Mr. Gemarais spoke with Mr. Ferreira.

16. It may be that Mr. Ferreira was truthful when he testified that he did not actually threaten Mr. Gemarais with the loss of his job if he did not join the union. Mr. Ferreira may have thought that the statements he made to Mr. Gemarais were not threats. Nevertheless, Mr. Gemarais' evidence was clear as to what Mr. Ferreira told him. In the absence of any evidence from Mr. Ferreira as to what he actually said to Mr. Gemarais, we have found that Mr. Ferreira advised Mr. Gemarais that if he did not join the union he would lose his job.

17. Counsel for the union argued that Mr. Gemarais never actually signed a union card and thus submitted that there was no evidence that any membership evidence was obtained by threats of job loss. Whether an employee actually resists joining a union notwithstanding that an organizer used the probability of the loss of that employee's job for failing to join or as a reason to join is not determinative of the issue. The Board is concerned with whether, on an objective assessment of the circumstances, an applicant seeking certification solicited membership evidence using improper or intimidatory tactics.

18. The Board has consistently ruled that a trade union cannot induce employees to support it in an organizing campaign by linking an employee's continued employment with joining the union during an organizing campaign or certification proceeding. In *T & F Construction Equipment Rental Limited*, [1983] OLRB Rep. Dec. 2116 the Board wrote at 2122:

"Membership evidence is the principal evidence in a certification proceeding. It is in the nature of documentary hearsay and, in order not to disclose the identity of the persons on whose behalf it has been tendered, the evidence is not subjected to cross-examination. Therefore the Board has always required that it be free of any taint. Where taint is alleged because of the conduct and representations made during the course of soliciting the membership evidence, the Board has a two-fold concern with respect to the nature of the conduct and representations. First, the Board must be satisfied that the applicant, through its representations and supporters, has not engaged in conduct which violates the Act, particularly section 70. Second, the Board, must be satisfied that the membership evidence was not obtained by procedural irregularities or misrepresentation. See *Alex Henry & Son Ltd.*, [1977] OLRB Rep. May 288.

In view of that nature of the Board's concern, its practice over many years has been not to give any weight to membership evidence where it has been obtained by threats of loss of employment. It is well-established in the Board's jurisprudence that a threat of loss of job is intimidation contrary to section 70 of the Act. See *L. M. Welter Limited*, [1965] OLRB Rep. April 34 and *Intermodal Marine Surveys Ltd.*, [1979] OLRB Rep. April 321."

See also *VR/Wesson Limited*, [1968] OLRB Rep. Nov. 811 at 814; *Chemical Corporation of Canada Limited*, [1980] OLRB Rep. Dec. 1805 at 1808-09; *Chemtrusion Inc.*, [1979] OLRB Rep. Dec. 1150 at 1151; and *Aurora Steel Service Limited*, [1986] OLRB Rep. March 301 at 303.

19. In this case, the misrepresentations alleged did not relate to the character or quality of membership in the applicant and did not, in any way, affect an employee's ability to freely decide whether or not to join the applicant. That is not the same situation with respect to the conversations between Mr. Ferreira and Mr. Gemarais which was in our view intimidatory. While the Board would ordinarily not place any weight on the membership evidence collected by an organizer who threatened employees with the loss of employment and who was also a union official, in this case, we only received evidence about such a threat in relation to one employee. Two other employees called by the respondent as its witnesses testified about what was said to them by the union organizer. Neither of them even suggested that the union organizers had told them that their jobs were in jeopardy if they did not immediately join the applicant. Furthermore, Jorge Machado, a site supervisor and assistant superintendent of the respondent also testified that the applicant's organizers had approached him. Nothing was said to him relating a lack of union membership to a loss of employment. In these circumstances, we are not prepared to find that Mr. Ferreira used that suggestion in collecting all or a majority of the membership evidence filed. Nevertheless, the evidence of Mr. Gemarais causes us to have considerable doubt as to whether some of the other employees of the respondent may have joined the applicant after being told that they would lose their jobs if they did not join.

20. Therefore, having regard to the foregoing, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of one or other of the constituent trade unions of the applicant and therefore, pursuant to section 10(3) of the *Labour Relations Act*, are deemed to be members of the applicant on December 22, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

21. In view of the doubt created as to whether the membership evidence filed by the applicant represents the true wishes of the employees with respect to being represented in collective bargaining by the applicant, the Board hereby exercises its discretion under section 7(2) of the *Labour Relations Act* to direct a representation vote.

22. A representation vote will be taken of the employees of the respondent in the bargaining unit. All those employed in the bargaining unit on the date hereof who are so employed on the date the vote is taken will be eligible to vote.

23. Voters will be asked to indicate whether they wish to be represented by the applicant in their employment relations with the respondent.

24. This matter is referred to the Registrar.

#### **DECISION OF BOARD MEMBER C. A. BALLENTINE;**

1. I disagree with the majority in their directing a representation vote, solely on the evidence of one of four company witnesses, all of whom were under subpoena. None of the employees that signed union cards came forward and made any charges against the union's organizers, and there was no statement of desire opposing the union by the employees.

2. This Board should weigh very carefully allegations or charges made exclusively by employers in certification applications in recognition of employers' interests in blocking the certification of unions.

3. This employer attempted to have employees excluded for the purpose of the bargaining

unit count. These were employees that the employer admitted it had employed illegally under section 18 of the regulations under the *Immigration Act*. Secondly this employer made a series of charges against the union's membership evidence. The majority answered the alleged misrepresentation charges in paragraph 13 of its decision and states:

The allegations of misrepresentation alone do not cause us to disregard or to have doubts about any of the membership evidence filed. We do not believe that the employees' ability to freely decide whether to join the applicant was in any way affected. The misrepresentations did not relate to the effect or purpose of the membership evidence. The evidence of intimidatory or coercive statements made by the applicant's organizers did not relate to any of the employees except Mr. Gemarais.

Notwithstanding this finding, the majority go on to direct a representation vote.

4. Because of the admitted illegal acts of the employer, (hiring illegal immigrants and then releasing them when the union came along), I am convinced that the true wishes of the employees who had signed union cards by the application date will not now be ascertained. Out of a total of seven employees determined to be in the bargaining unit, three have left, the two employees who the company had illegally employed and Mr. Gemarais, who voluntarily quit the company. Therefore the employees of this employer who will be eligible to vote will be drastically changed from the employees who had all voluntarily joined the union by the date of the application. Considering also that this is a construction industry application the size of the bargaining unit on the date this decision is released may bear no resemblance to the bargaining unit that existed on the application date. The employer's attempt to rely on his own illegal conduct and the challenging of membership evidence which the majority has found has not affected the expression of the wishes of the employees should not now frustrate that very expression.

5. When this Board must decide on the balance of probabilities it should place substantial weight on the expressed views of the employees. The concept that an employer should enjoy equal or greater rights over the expressed wishes of employees to join a union of their choice ignores one employer's interest in opposing the application. This Board has a duty under the Preamble of the Act to encourage free collective bargaining not discourage it.

6. On the membership evidence filed, more than fifty-five per cent of the employees of the respondent in the bargaining unit are deemed to be members of the applicant on the application date and therefore indicate sufficient support for the applicant to have been certified without a vote.

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**0414-85-R Union of Bank Employee (Ontario) Local 2104, Canadian Labour Congress, Applicant v. National Trust, Respondent v. Group of Employees, Objectors**

**Bargaining Unit - Certification - Financial institution with 37 branches in city - Union applying for a unit of employees working in 7 of the branches - False assumption that union certifiable in all 7 units - Whether unit appropriate - Board adhering to established pattern of branch-based bargaining units - Full and part-time units also appropriate**

**BEFORE:** *R. O. MacDowell*, Alternate Chair, and Board Members *D. A. MacDonald* and *R. R. Montague*.

**APPEARANCES:** *C. M. Mitchell* and *D. Devine* for the applicant; *Brian Burkett*, *Mona Anis*, *Sharon Scott* and *Clare Fitzgerald* for the respondent; *Jenny Kokkas*, *Lillian Byrne*, *Ann Lomack*, *Cindy Medeiros*, *Cindy Dobbin* and *Dorothy Montague* for the objectors.

**DECISION OF R. O. MACDOWELL, ALTERNATE CHAIR AND BOARD MEMBER D. A. MACDONALD;** February 2, 1988

I

1. This is an application for certification. In order to appreciate the question currently before the Board, it is necessary to sketch in some background. The provisions of the Act to which reference will be made are as follows:

6.-(1) Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.

(2) Where, upon an application for certification, the Board is satisfied that any dispute as to the composition of the bargaining unit cannot affect the trade union's right to certification, the Board may certify the trade union as the bargaining agent pending the final resolution of the composition of the bargaining unit.

7.-(1) Upon an application for certification, the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and the number of employees in the unit who were members of the trade union at such time as is determined under clause 103(2)(j).

(2) If the Board is satisfied that not less than 45 per cent and not more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall, and if the Board is satisfied that more than 55 per cent of such employees are members of the trade union, the Board may direct that a representation vote be taken.

(3) If on the taking of a representation vote more than 50 per cent of the ballots cast are cast in favour of the trade union, and in other cases, if the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit.

2. The respondent employer is a financial institution with 37 branches in Metropolitan Toronto. Fourteen branches are grouped in its "Metro East" region, 17 branches are grouped in its "Metro West" region, and 6 branches are included in its "Metro Central" region. The respondent

employs several hundred employees distributed somewhat unevenly among its branches of various sizes.

3. On May 17, 1985, the union applied for certification as bargaining agent for a unit of employees working in 7 of the employer's branches: 6 within its "Metro East" region, and one in the "Metro West" region. The application in respect of an eighth branch was withdrawn. It was agreed by all parties that single-branch units of employees would be appropriate for collective bargaining. This has, by now, become the established pattern for organizing these financial institutions, and the Board has previously found single-branch units to be appropriate. It was also agreed that some broader-based bargaining unit might also be appropriate. However, the parties disagreed about how a more broadly-based bargaining unit should be defined.

4. The union took the position that a unit covering the employees of all 7 branches would also be appropriate and urged the Board not to distinguish between full-time and part-time workers as it often does. In the union's submission all of the full time and part time employees at these seven branches could be comfortably included in one large unit. The employer was content with single-branch bargaining units, but argued that if the Board were disposed to consider some broader bargaining unit configuration, such unit should include all branches within a regional subdivision, or alternatively, all 37 branches in Metropolitan Toronto. The employer also urged the Board to maintain the traditional distinction between full-time and part-time workers because, it said, part-time workers had a separate community of interest which warranted their separation into separate bargaining units either within each branch, or in a multi-branch unit.

5. The shape of the bargaining unit was only one of many issues in dispute. We shall not review those issues here. It suffices to say that among them was the union's claim that quite a number of individuals in various job categories should be excluded from its proposed unit, either because they exercised managerial functions, or because they did not share a community of interest with the target group that the union sought to represent. Some of these challenges were abandoned along the way. Others were the subject of litigation and eventual determinations by the Board (differently constituted). What is clear, though, is that at the earlier stages of this proceeding, it was very difficult to discern the precise contours or composition of the bargaining unit, or the degree of membership support enjoyed by the union within *any* unit which might be found to be appropriate.

6. The Board considered the bargaining unit question, in general terms, in a decision released on February 28, 1986. The Board acknowledged that the employees in any proposed bargaining unit should have a "community of interest" because it would make no labour relations sense to "lump together" groups of employees whose interests were so disparate that they could not easily bargain together. On the other hand, the panel cited with approval the decision in *Canada Trustco Mortgage Company*, [1977] OLRB Rep. June 330 which contains the following observations:

19. In the instant case, the standardization impressed on all employment relations by the flow-charts and policies of the employer does give rise to a community of interest among all employees in the branches of the south-western Ontario region. But that does not of itself dispose of the question of what is the appropriate bargaining unit. As the Board said in *Ponderosa* [[1987] OLRB Rep. Nov. 7]:

It should be observed, however, that the Act does not create any presumption in favour of the most comprehensive unit of employees, even though these employees may have a community of interest. Section 1(1)(b) of the Act states that "bargaining unit" means a unit of employees appropriate for collective bargaining, whether it is an employer unit of a plant unit or a subdivision of either of them." This provision makes it quite clear that the determination of appropriateness does not always lead to the conclusion that the most comprehensive unit is also the most appropriate unit.

Consideration of the wishes of employees and of industrial relations policy, may very well dictate that a smaller bargaining unit is the appropriate unit.

20. It is also possible, of course, that different communities of interest will exist at one and the same time among several different groupings of employees. Obviously certain common employment interests exist among all employees of the respondent in Canada; the portion of those employees who are within Ontario have a further common interest; and the group of employees working under the direction of the London regional office have employment interests in common that they do not share with their fellow employees elsewhere in Ontario or in Canada at large.

Community of interest was an important consideration, but it was not the only one, and had to be weighed together with other concerns such as the general desirability of broader-based bargaining units and a recognition that more comprehensive units should not be embraced where the effect would be to impede the establishment of any collective bargaining at all. The Board further recognized that, based on experience, collective bargaining could be viable and successful in a variety of formats and, adopted these comments from *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266:

We are troubled by the fact that a largely administrative and policy-laden determination has mushroomed in some cases into an elaborate, expensive, and time-consuming process for deciding a relatively simply question: does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.

7. In the result, the panel was persuaded that although single-branch units were appropriate, some broader bargaining unit configuration might also be appropriate and that, in general, such extended area bargaining structures should be encouraged unless there were other countervailing collective bargaining considerations. The question was, where to draw the line? Even if the employees in all seven branches shared some community of interest with each other was a group of 7 branches a rational subdivision of the employer's organization for collective bargaining purposes? Was the union really just "gerrymandering"; that is, tailoring its position solely to the extent of its support? What weight, if any, should be given to the extent or success of the union's organizing efforts? What if the union had solid support in several branches but little or no support in one or two? In choosing among the possible appropriate units, should the Board be concerned about sweeping in pockets of employees who had expressed little or no interest in collective bargaining? And should the Board abandon its long established practice of grouping full-time and part-time employees into separate bargaining units?

8. The "gerrymandering" issue, we should add, was initially raised by the union itself. The union asserted that, if the Board had any concerns that the union was using its established membership support in particular branches to "sweep in" branches in which its organizing efforts had been less successful, or that it was tailoring its unit proposal to the precise group that it had organized, the Board should be reassured. According to the union, it was "certifiable" in each of the 7 branches which, everyone agreed, would be appropriate bargaining units by themselves. The union asked parenthetically: if single branches are appropriate, if the union is certifiable in all 7 units on a branch-by-branch basis, if extended area bargaining is desirable, and if the employees in those 7 branches have a "sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer" (to adopt the *Hospital for Sick Children* formula), why not issue one certificate covering 7 branches rather than 7 individual certificates each restricted to a single branch? Why have seven separate bargaining tables (one for each generically similar branch) when bargaining could be conducted



more economically and efficiently on a broader basis? There was no question of “gerrymandering” because the union was entitled, so it said, to be certified in all seven branches anyway.

9. In the result, but based on the factual assumptions set out above, the Board concluded that a 7-branch bargaining unit would be appropriate and expressed the following tentative conclusion found at paragraphs 41-44 of its decision:

41. To summarize, it is only the bargaining framework, or structure that is at issue in this case. The reduction of the “appropriate” unit to the minimum level required for organizing to “gain a foothold”, in the language of the earlier cases, is not the issue: the applicant already has had its success in organizing at a number of the respondent’s branches. Nor is the appropriateness of those individual branches as units for certification in issue: at the very least, prior Board jurisprudence points to their appropriateness as individual branch-units standing alone, and the agreement of the parties on the particular facts before us confirms that certificates could issue on that basis. The *only* question, in light of that, is whether those certificates would more appropriately be combined at this stage into one, and for all of the reasons set forth above, we conclude that they would.

42. *It follows that only those branches for which the applicant is otherwise certifiable are affected by this decision on the part of the Board to consolidate individual branch-units into what the Board finds to be a “rational and viable” single bargaining unit.* Unlike the British Columbia Board, we see nothing in our legislative mandate which prevents us from taking into account the fact that individual certificates for bargaining are about to issue in any event, when turning our mind to the question of the appropriate form of bargaining unit within which that bargaining ought best to proceed.

43. *While the argument has proceeded to this point on the basis of certain assumptions, a final determination of which of the 7 branches the applicant is in fact entitled to certification for will have to await the resolution of all outstanding issues relating to the membership evidence filed in this case, together with the list of “employees” employed in the unit at each branch.* Should it become material, the Board will also have to decide at that point whether it would be appropriate to issue an “interim” certificate covering all branches for which the applicant is immediately certifiable, as opposed to those which, for one reason or another, the applicant would only become certifiable following the taking of a representation vote.

44. Finally, on the issue of whether the “part-time” and “full-time” employees ought to form one bargaining unit or two, the Board is not persuaded in this case that it ought to depart from its own practice of separating the two for the purpose of collective bargaining. For a review of the considerations taken into account by the Board in this regard, see *Board of Education for the Borough of Scarborough*, [1980] OLRB Rep. Dec. 1713.

[emphasis added]

10. It will be seen from paragraphs 42 and 43 that both the union’s argument and the Board’s analysis are based upon certain “assumptions” - in particular that the union would be certifiable in each branch if each branch were determined to be an appropriate bargaining unit. The problem is, that even accepting the union’s submission that the Board should ignore the traditional distinction drawn between full-time and part-time workers, the union is *not* certifiable in all 7 “single-branch possible units”. As it turns out, the union would be certifiable at only four branches, in a vote position in one and in a dismissal position in the remaining two. Moreover, if one maintains the distinction between full-time and part-time employees, as the panel decided to do in paragraph 44 of its decision, the situation becomes even more complicated. The union would be certifiable in five full-time, single-branch bargaining units and in a vote position in the other two. It would be certifiable in three part-time branch units, in a vote position in two and in a dismissal position in the remaining two. The union’s support is, in fact, spread rather unevenly over the seven (originally eight) branches applied for.

11. Quite clearly then, the case was argued before the earlier panel of the Board either on the basis of facts not foreseen, or not accurately forecast. Indeed, the entire thrust of the decision is based upon an assumption of membership support which turned out to be inaccurate. That being so, we are left to determine how best to proceed in light of the situation now before us.

12. Counsel for the union submits that we should adhere to the “spirit” of the earlier Board decision by issuing an *interim* certificate encompassing all those full-time or part-time branch-based employee groupings wherein the union would be immediately certifiable if branch units were individually deemed to be appropriate (as the parties agreed they would be), and direct representation votes in those other full-time or part-time “possible” branch-based units where the union would be entitled to one. If it “wins” the votes, i.e. if a majority of employees vote in favour of union representation, the union submits that the Board should then issue a *final* certificate consolidating the single-branches (or some of them) into one unit covered by one certificate. In effect, the union says: find “appropriate” any grouping in which, one way or another, it can establish majority employee support on a branch by branch basis. On this theory, the ultimate shape of the bargaining unit will depend upon the extent of the union’s membership support established either by membership cards filed at the time the application was made, or representation votes taken now. It will inevitably result in an irregular patchwork, and, of course, requires a rather strained reading of section 6(2) for which there is no precedent. Alternatively, the union urges the Board to issue a final certificate (or certificates) respecting any branch-based grouping in which the union is immediately certifiable, and, on the basis of the results of representation votes in the other “pieces”, issue final certificates to them as well; then, pursuant to section 106(1) of the Act, reconsider the entire affair, revoke all of the certificates already granted and issue a single new certificate covering all locations or employee groups where the union has demonstrated majority support. Counsel argues that the reconsideration power has been used in this way in other jurisdictions and submits that the Board should take the same approach here - especially since there is unlikely to be any collective agreement to get in the way.

13. The employer submits that the earlier panel’s opinion is quite clearly premised upon certain factual assumptions which turned out to be wrong and, for that reason alone, should be reconsidered. For the purposes of its earlier opinion, the Board was content to assume, as the union submitted, that the union was certifiable in each of the 7 single branch units. The earlier panel did not specifically turn its mind either to the possibility that the union was not certifiable at one or more branches, or to the ramifications of recognizing the separate community of interest of part-time workers. Moreover, in counsel’s submission, the actual state of the facts points out a jurisdictional flaw in the earlier panel’s reasoning which may not have been readily apparent at the time.

14. The employer submits that the attraction of the Board’s proposed approach significantly diminishes when its application may produce bargaining units of full-time and part-time employees which are not geographically contiguous - thus creating a result very different from the Board’s usual inclination which is to “mirror” full-time and part-time bargaining unit descriptions. The employer contends that the bargaining unit configuration resulting from an application of the Board’s analysis to the facts as they turned out to be would look rather odd. The unit would consist of pockets of full-time and part-time employees distributed unevenly and quite randomly across 7 of the respondent’s 37 branches in Metropolitan Toronto. The formula which the union urged upon the Board (and the Board tentatively accepted) only “works” if the factual assumptions upon which it is based are fully borne out by the evidence. They were not.

15. More fundamentally, though, the employer submits that the original panel’s anticipated mode of procedure is inconsistent with the scheme of the Act. Sections 6 and 7 of the Act contem-

plate that the Board will *first* determine the appropriate bargaining unit; then (and only then), conduct a representation vote if necessary within that unit, in order to determine whether the union is entitled to certification. One does not conduct a “representation vote” under section 7 in order to find out whether a union *might* be certifiable in some sub-group of employees, then use that information to establish whether some broader employee configuration, is, in fact, the appropriate bargaining unit. To put the matter colloquially: the earlier decision “puts the cart before the horse”; for it is quite clear that what the Board had in mind was testing employee wishes *with respect to representation* in some segments of a *possible* bargaining unit as a means for ultimately determining the appropriate bargaining unit. The employer argues that the language of sections 6 and 7, as well as Board practice indicate that a vote under section 7 may be directed only after the unit is determined. In this regard, these sections differ from the pre-hearing vote provisions which speak in terms of a “voting constituency” precisely because the unit has yet to be determined. Section 6(1) permits the Board to canvass employee wishes on the scope of the bargaining unit, but the earlier panel did not purport to act pursuant to section 6(1), nor does the union argue that this panel should do so now.

16. The decision also implies that support for *the union* (by signing membership cards) is synonymous with support for any unit which may later be applied for; but if there is less than fifty-five per cent support in some subgroup, the Board will poll those employees (but not others) about their desire for trade union representation then fashion the unit accordingly. Counsel for the employer submits that it is artificial, wrong in law, and bad policy to make the definition of the bargaining unit contingent upon union membership or employee preferences with respect to representation. In his submission the two are quite different questions, and even if they were related (which he says they are not) would require that the Board canvass all of the employees potentially affected, not just those subgroups in which the union was not immediately “certifiable”. The earlier decision seems to suggest (implicitly, if not explicitly) that the bargaining unit line can be drawn just about anywhere in the financial/service sector, and that the critical consideration is the extent of union support. He urges the Board to reconsider the earlier panel’s decision and to return to the model of branch-by-branch bargaining units, which everyone concedes are “appropriate” and which are consistent with the pattern established by such cases as *Canada Trustco Mortgage Company*, *supra*.

17. The issue before this panel of the Board, however, is not really a reconsideration of the earlier Board decision, since no final decision was made except to separate full time and part time employees into their own bargaining units. The question is how much weight should be given to the other matters considered in the decision, when the factual propositions upon which those opinions were based were not borne out by the evidence.

18. We do not attach much significance to the union’s complaint that this proceeding has taken a long time to complete, and that we should therefore favour the union’s formula for multi-branch bargaining units because the union could have “walked away” with single branch certificates quite some time ago. This proceeding *has* taken a long time. But that unhappy result flows, in substantial measure, because of legitimate disputes about the status of certain individuals, and because of the union’s disinclination to accept the established branch-by-branch pattern of organizing heretofore prevalent in this industry. While one cannot fault the union for advancing a novel proposition, that proposition leads to both practical and legal difficulties when its factual underpinnings cannot be established.

19. Of more significance is the fact that the earlier panel’s approach is substantially based upon and shaped by a hypothetical. Once those premises are shown to be false, the union’s position loses much of its allure, and becomes, mechanically, quite difficult to apply within the prescribed



statutory framework. In particular, we find considerable merit in the employer's submission that the scheme of the Act requires the Board to *first* determine the appropriate unit *before* considering the depth of union membership support, and if employee wishes are to be canvassed with respect to the unit, that is done directly under section 6(1), not by means of a "representation vote". It is not at all clear that those jurisdictional concerns were canvassed before the earlier panel, and they certainly were not canvassed in light of the facts as we now know them to be. Because of the way the union put its case, the earlier panel was asked to express an opinion based upon what it clearly recognized were "assumptions", while our task, in contrast, is to make a determination based upon the facts before us (which are different), and legal arguments which appear to be matters of first impression.

20. What then is the best approach now, given the unusual and perhaps unfortunate way in which this case has unfolded? In our opinion, we should not look to employee wishes with respect to representation as a gauge for determining the description of the bargaining unit, and, in particular, we should not canvass the wishes of some employees in this regard but not others. Nor, in our opinion, is it proper to direct a series of "representation votes" in what would necessarily be subdivisions of any bargaining unit ultimately determined. That, in our view, is not consistent with the scheme of the Act. Furthermore, whatever elasticity may be found in the concept of interim certification, we do not think that it can or should be stretched to cover the novel proposition advanced by the union in this case. Indeed, the probable result of the union's proposed formula is, in itself, rather telling: a single and allegedly coherent bargaining unit which consists of a patchwork quilt of full-time and part-time employees (interspersed with other unrepresented full-time and part-time workers) distributed unevenly and assymmetrically over seven of the eight branches which were the target of the union's original organizing campaign. Had that particular unit been proposed in the first instance, it is difficult to resist the conclusion that it would have been summarily rejected as inappropriate - unless, of course, the Board were persuaded that virtually *any* subdivision of the respondent's employees would be appropriate - a proposition for which there is little or no jurisprudential support, and which would essentially negate the Board's role and responsibility under section 6(1) of the Act. Whatever plausibility that argument may have had at one time, it is not now supported by the Board's established jurisprudence.

21. In all the circumstances of this case, we are persuaded that we should return and adhere to the established pattern of branch-based bargaining units which all parties agree are appropriate, and which the Board has found to be appropriate in the past. It may well be that some broader unit would also be appropriate. It may also be that within the confines of an integrated closely regulated financial institution the Board has considerable flexibility in fashioning the appropriate bargaining unit which may even include clusters of generically similar but geographically disparate branches. However, we decline to speculate.

22. Having regard to the foregoing, and pursuant to section 6(1) of the Act, the Board finds the following to be units of employees appropriate for collective bargaining:

*Bargaining Unit #1 (Full-time):*

All employees of the respondent at 635 College Street, save and except branch managers, administration officer(s)/assistant branch manager(s) exercising managerial functions within the meaning of section 1(3)(b) of the Act, administration officer trainees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

*Bargaining Unit #2 (Full-time):*

All employees of the respondent at 1882 Eglinton Avenue, save and except branch managers, administration officer(s)/assistant manager(s) exercising managerial functions, administration officer trainees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

*Bargaining Unit #3 (Full-time):*

All employees of the respondent at 2072 Danforth Avenue, save and except branch manager, administration officer(s)/assistant manager(s) exercising managerial functions, administration officer trainees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation.

*Bargaining Unit #4 (Full-time):*

All employees of the respondent at 1547 Bayview Avenue, save and except branch managers, administration officer(s)/assistant branch manager(s) exercising managerial functions within the meaning of section 1(3)(b) of the Act, administration officer trainees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

*Bargaining Unit #5 (Full-time):*

All employees of the respondent at 1520 Danforth Avenue, save and except branch managers, administration officer(s)/assistant branch manager(s) exercising managerial functions within the meaning of section 1(3)(b) of the Act, administration officer trainees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

*Bargaining Unit #6 (Full-time):*

All employees of the respondent at 45 Overlea Blvd., save and except branch managers, administration officer(s)/assistant branch manager(s) exercising managerial functions within the meaning of section 1(3)(b) of the Act, administration officer trainees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

*Bargaining Unit #7 (Full-time):*

All employees of the respondent at 3041 Kingston Road, save and except branch managers, administration officer(s)/assistant branch manager(s) exercising managerial functions within the meaning of section 1(3)(b) of the Act, administration officer trainees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

*Bargaining Unit #8 (Part-Time):*

All employees of the respondent at 635 College Street, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except branch manager, administration officer(s)/assistant branch manager(s) and administration officer trainees.

*Bargaining Unit #9 (Part-Time):*

All employees of the respondent at 1882 Eglinton Avenue, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except branch manager, administration officer(s)/assistant branch manager(s) and administration officer trainees.

*Bargaining Unit #10 (Part-Time):*

All employees of the respondent at 2072 Danforth Avenue, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except branch manager, administration officer(s)/assistant branch manager(s) and administration officer trainees.

*Bargaining Unit #11 (Part-Time):*

All employees of the respondent at 1547 Bayview Avenue regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except branch manager, administration officer(s)/assistant branch manager(s) and administration officer trainees.

*Bargaining Unit #12 (Part-Time):*

All employees of the respondent at 1520 Danforth Avenue regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except branch manager, administration officer(s)/assistant branch manager(s) and administration officer trainees.

*Bargaining Unit #13 (Part-Time):*

All employees of the respondent at 45 Overlea Blvd. regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except branch manager, administration officer(s)/assistant branch manager(s) and administration officer trainees.

*Bargaining Unit #14 (Part-Time):*

All employees of the respondent at 3041 Kingston Road regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except branch manager, administration officer(s)/assistant branch manager(s) and administration officer trainees.



23. The Board is satisfied on the basis of all of the evidence before it that more than fifty-five per cent of the employees of the respondent in bargaining units #1, 2, 3, 4, 5, 9, 10, and 14, at the time the application was made, were members of the applicant on June 4, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

24. Certificates will issue to the applicant with respect to bargaining units #1, 2, 3, 4, 5, (full-time) and #9, 10, and 14 (part-time).

25. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the respondent in bargaining units #6, 7, 12, and 13, at the time the application was made, were members of the applicant on June 4, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

26. A representation vote will be taken of the employees of the respondent in each of these bargaining units. All employees of the respondent in each bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

27. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

28. The Board is further satisfied on the basis of all the evidence before it that less than forty-five per cent of the employees of the respondent in bargaining units #8 and #11, at the time the application was made, were members of the applicant on June 4, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

29. The application is dismissed with respect to bargaining units #8 and #11.

30. The matter is referred to the Registrar.

31. The Board does not consider it appropriate to comment at this time upon the possible exercise of its discretion under section 106 of the Act to consolidate the bargaining structure should the union be successful in one or more of the representation votes, and should subsequent bargaining difficulties arise which might be appropriately remedied by a consolidation of the bargaining structure.

#### **DECISION OF BOARD MEMBER RENE R. MONTAGUE;**

1. I do not agree with the majority decision in this matter, and it seems to me that this case is a perfect illustration of what the Board was worried about in the *Hospital for Sick Children, supra*, when it wrote:

We are troubled by the fact that a largely administrative and policy-latent determination has mushroomed in some cases into an elaborate, expensive, and time-consuming process for deciding a relatively simple question: does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain

together on a viable basis without at the same time causing serious labour relations problems for the employer.

2. In this case, the employees have been waiting since May 17, 1985 for a determination of their right to engage in collective bargaining. I am concerned that, by now, the entire exercise may have become academic. The delay in determining the composition of the bargaining unit may, from a practical point of view, have defeated the employees' right to collective bargaining altogether.

3. It is clear to me that the workers in the branches we are dealing with do share a substantial community of interest. The earlier panel of the Board thought so too - otherwise they would not have adopted the approach which they did. It seems to me that whatever the legalities of the situation, there are two equally sensible alternative solutions to the problem before us and both of them are better than the one that the majority has adopted.

4. In the first place, we *could*, and in my opinion *should*, grant the seven branch broadly based unit which the union initially sought, because I am persuaded that the employees in those seven branches do share a sufficient community of interest to justify that finding. I am not persuaded that such unit would produce the kinds of collective bargaining problems referred to by the Board in *Hospital For Sick Children*. In the alternative, the spirit of the earlier panels' decision, and fairness to the parties, could best be accommodated by fashioning full-time and part-time units encompassing those branches in which the union has demonstrated more than 55 percent support so that it would otherwise be certifiable on an individual branch basis. For all other branches or employee groupings we could adopt the single branch formula urged upon us by the employer. The result would be to somewhat broader (but still in my view appropriate) units of full-time or part-time employees across several branches, and a number of other branch-based full-time or part-time units which follow the historical organizing pattern and which the parties agree are individually appropriate. This approach seems to me to be an alternative resolution of the competing considerations and circumstances present in this case, and one which I find preferable to the formula which the majority has adopted.

5. Finally, I must comment briefly on the use of section 106 to consolidate bargaining units. It seems to me that this makes good sense, and if other labour relations are doing so under statutes which have the same language as ours does maybe we should be doing the same thing. Certainly it does not make sense to perpetuate a situation which multiplies the number of bargaining tables and the collective bargaining problems which small groups of employees may face. If we have the authority to simplify and rationalize the bargaining structure, it is my view that we should do so.

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**2052-87-U Local 2228 of the International Brotherhood of Electrical Workers, Complainant v. Nortec Air Conditioning Industries Ltd., Respondent**

**Duty to Bargain in Good Faith - Ratification and Strike Vote - Unfair Labour Practice - Employer refusing to sign collective agreement because a memorandum of settlement concluded between the parties was not ratified by employees - Breach of duty - Employer not entitled to insist upon employee ratification as a pre-condition to signing a collective agreement**

**BEFORE:** *Judith McCormack*, Vice-Chair, and Board Members *R. R. Montague* and *W. H. Wightman*.

**DECISION OF THE BOARD;** February 9, 1988

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant alleges that the respondent has violated section 15 of that Act by refusing to sign a collective agreement because a memorandum of settlement concluded between the parties was not ratified by employees.

2. On December 24, 1987 the Board issued the following decision:

After carefully considering the evidence and submissions in this matter, we find that the respondent has violated section 15 of the *Labour Relations Act*. In the circumstances of this case, we also find it appropriate to give the parties an opportunity to come to an agreement with respect to remedy. However, we remain seized with this matter, and should the parties be unable to reach agreement on the question of remedy, they should advise the Registrar accordingly, and the matter will be relisted for hearing.

Our reasons will follow.

We now provide our reasons.

3. The complainant in this matter was certified as the exclusive bargaining agent for employees in January of 1987. Negotiations for a collective agreement commenced on February 24, 1987. In those negotiations, the complainant was represented by a negotiating team composed of three bargaining unit employees and Paul Jollymore, an assistant business manager to the complainant. Shortly after negotiations had commenced, Raymond Charron, another assistant business manager took Jollymore's place. The respondent was represented by Joseph Houlahan, the respondent's general manager, Paul Kane, the respondent's counsel and several other individuals who attended from time to time. The parties met eleven times and were able to reach agreement on a large number of items. Among other things, they agreed upon the following articles during the course of these meetings:

8.05 Grievances sent to arbitration shall be heard and decided upon by one (1) arbitrator jointly selected by the Company and the Union from the list of arbitrators annexed to this agreement. In the event that the Company and the Union cannot agree on the selection of a single arbitrator, then either party may request the Minister of Labour to appoint an arbitrator to hear and settle the grievance.

23.03

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Note: All employees while working in cylinder production shall receive an extra twenty (20) cents per hour. This shall be the only separate classification.



4. On July 28, 1987, the parties met in conciliation and were able to reach agreement on all matters in dispute with the assistance of a Ministry of Labour Conciliation Officer. This agreement took the form of a standard memorandum of settlement which incorporated all matters to which the parties had previously agreed and those agreed upon that day. Subsequently, Mr. Charron arranged with Mr. Houlahan to hold a ratification meeting for employees on the respondent's premises on August 11, 1987. He also sent the settlement to employees in the form of an earlier draft which had been submitted by the respondent during negotiations, together with the changes and additions which had been made by the parties on July 28, 1987. The earlier draft was sent to employees because Mr. Charron wished them to have ample opportunity to review the settlement and he did not want to wait to receive the final draft collective agreement drawn up by the respondent.

5. In the meantime the respondent's Board of Directors approved the memorandum of settlement. Mr. Kane then drew up a draft collective agreement in accordance with the terms of the settlement and sent it to the complainant on August 6, 1987. With respect to article 8.05, the parties had agreed on July 28, 1987 that the respondent was to supply the list of arbitrators referred to therein. While there was some conflict in the evidence before us, we concluded that Mr. Kane included with the August 6th draft collective agreement the following Appendix "B":

#### LIST OF ARBITRATORS

The following persons shall act as single arbitrators to hear the grievances under Article VIII of this Agreement:

David Kates

Edward Ratushny

Richard Abbott

The above-noted arbitrators shall act in rotation and in the order in which their names appear on this list.

6. Mr. Charron was out of town when the August 6th draft collective agreement arrived at the complainant's office. As a result, two of his colleagues checked and proofread the draft on his behalf. Upon his return, they brought to his attention some minor discrepancies and the fact that the last sentence of Appendix "B" appeared to be inconsistent with article 8.05. Mr. Charron then advised Mr. Houlahan that although there were a few minor errors in the draft, the union would be proceeding with the ratification vote.

7. On August 11th, Mr. Charron attended and conducted a secret ballot ratification vote on the respondent's premises. Because the employees had been sent an earlier draft than that of August 6th, Mr. Charron again reviewed the changes resulting from the conciliation meeting of July 28th. There was no dispute that employees at this meeting were voting on the substance of the memorandum of settlement as reflected in the August 6th draft, with the exception of Appendix "B". There were a few questions from employees, some brief discussion and the vote was held. Employees rejected the settlement. After the vote, there was a further discussion during which it emerged that at least one employee, described as a "tester", was particularly unhappy with respect to the terms of the settlement. The meeting then broke up.

8. Subsequently, Mr. Charron met with Mr. Houlahan to discuss the situation and they came to an agreement that the testers should also receive the extra twenty cents per hour set out in article 23.03. Both obviously hoped that this would make the settlement more acceptable to employees. Another ratification meeting was held and Mr. Charron explained the change to

employees. Another secret ballot vote was held and employees rejected the amended settlement. There was some dispute as to whether the discussion between Mr. Charron and Mr. Houlahan and the second ratification vote occurred on the same day as the first ratification vote or the following day. Having heard the testimony of both Mr. Charron and Mr. Houlahan in this regard, we concluded that the latter's recollection of this event was more accurate and that the discussion and second vote occurred on the day following the first vote.

9. It was apparent that both parties were nonplussed by this turn of events. A meeting which had been previously set up to execute the collective agreement was cancelled by the respondent, and it was clear that the complainant was also unsure of its next step. Mr. Charron discussed the matter briefly with the temporary unit executive at the plant and advised them that he would consult his superiors. He then contacted the business manager who in turn consulted with the complainant's executive board and president. Between them they decided they would hold a strike vote of employees. If employees were not prepared to strike, the complainant would proceed to sign the August 6th draft collective agreement. Mr. Charron relayed this information to the unit executive and another vote was set up on September 2nd, 1987, again with the respondent's co-operation. Mr. Charron was not able to attend this meeting. Denise Amigao, a member of the union negotiating committee attended and handed out ballots, explaining to each employee as she did so that they were voting either to strike or to accept the collective agreement. However, the question that was actually put to employees was "do you want to go on strike?"

10. Employees overwhelmingly rejected going on strike. The complainant then decided that it would sign the August 6th draft agreement together with the tester change, and Mr. Charron advised Mr. Houlahan accordingly. Mr. Charron subsequently received the following letter from Mr. Kane dated September 9th:

I was contacted by Mr. Houlahan on September 4, 1987, regarding a telephone conversation I believe you had with him earlier on that day and advising that you wish to meet during the week of September 8, 1987, in order to execute the Collective Agreement. Mr. Houlahan in addition advised me as to some of the matters that apparently transpired since July 28, 1987, when we met with the Conciliation Officer.

You will recall that on July 28th, through the efforts of the Conciliation Officer, the negotiating parties settled the outstanding issues regarding the Collective Agreement. I forwarded the text of the full agreement as settled by the negotiating parties to your office on August 6, 1987.

Subsequent to August 6, 1987, I am advised that the Union recommended the Agreement as settled to its members in a ratification vote which was rejected. I am further advised that you subsequently had some discussions with Mr. Houlahan, who agreed on behalf of the company, at your request, to extend to all employees within the unit the 20 cents bonus now contained in the draft Agreement for those employees working in the cylinder department. I understand that a second ratification vote was held and the employees again rejected the Collective Agreement. You apparently advised Mr. Houlahan that during one or both of these ratification votes, certain of the employees expressed to you their wish that they not be covered by a Collective Agreement.

The company has heard nothing further regarding this matter until you advised on or about September 4, 1987, that the Union had organized and conducted a vote calling for a strike among the employees. You indicated to Mr. Houlahan that the strike vote was rejected and on the basis of that result you have called upon the company to execute the Collective Agreement.

Needless to say, I find the present set of circumstances somewhat confusing. *The company, through its negotiating team, and the Union's negotiating team have now agreed upon all the terms of the proposed Collective Agreement. The employees apparently do not now want a Collective Agreement, nor do they wish to go on strike. The execution of the Collective Agreement in its present form by the company places certain obligations upon it, including things such as the*

*deduction of union dues. The company is not prepared to take on those obligations with the information communicated by you that the employees refused to ratify such Collective Agreement. It would appear that this is a matter between the Union and its members and I am reluctant to see the company get involved prior to your settlement of this proposed impasse. If the employees are prepared to ratify the present wording of the Collective Agreement as settled by the negotiating team, I can assure that the company is more than prepared to execute the Collective Agreement. I hope this clarifies the company's position in this matter.*

[emphasis added]

11. Mr. Charron wrote back as follows:

In reference to your letter of Sept. 9/87, I would first like to advise that it contains two erroneous statements that I will correct immediately:

1. After the proposed settlement was rejected a first time, Mr. Houlahan and myself negotiated a .20 (twenty cent) increase *not for all employees but only for the two (2) employees in the testing section.*
2. I did not advise Mr. Houlahan "That certain employees had expressed their wish that they not be covered by a collective agreement." This statement was made to Mr. Houlahan after he met with his Plant Manager (at my request) to discuss the allegations made by an employee that the Plant Manager had said "that the employee could easily get .40 (forty cent) an hour increase without the Union and without paying dues." after he met with his Plant Manager, Mr. Houlahan and myself met again and he advised me that the Plant Manager had denied making any such statement and then indicated to me that according to the Plant Manager, the employee in question was not satisfied with either the salary proposals or the union. It was then that we discussed a .20 (twenty cent) increase for the testers only and a subsequent ratification vote was held.

Subsequent to the above event the Executive Board decided that the negotiating team needed a strong mandate and a strike vote was held on September 1st and this was rejected with the employees knowing full well that a refusal to strike meant that the Union would be signing the collective Agreement.

Thus we are now prepared to sign the collective Agreement as modified for the Tester as per the telecon Houlahan/Charron of the 4th of September, 1987.

12. Mr. Kane then replied by letter dated October 7th, 1987:

This is in reply to your letter to me dated September 22, 1987. Your letter is not totally accurate in terms of describing what in fact occurred.

I am advised that you met Mr. Houlahan in the company's parking lot after you held your first ratification vote. The employees apparently refused to ratify the proposed Collective Agreement. You advised Mr. Houlahan of this result and indicated that you were somewhat disturbed as you had anticipated that the proposal as negotiated would have been accepted by the employees. You then proceeded with our client to Mr. Houlahan's office and discussed the matter further. You advised Mr. Houlahan that one of the individuals in the testing department wanted to receive a bonus similar to that being proposed for the cylinder department. You also told Mr. Houlahan that apparently someone had said something to the effect that the plant manager had indicated that the employees could receive 40¢ an hour increase without a union. Mr. Houlahan indicated that he had not heard any such talk and in fact would be very surprised that the plant manager would say anything like this. You apparently asked if Mr. Houlahan had heard anything regarding the employees' attitude as to the Collective Agreement. Mr. Houlahan responded in the negative. You requested Mr. Houlahan to speak to the plant manager to see if he had heard anything as to the employees' attitudes and what might be causing the opposition to ratifying the Collective Agreement.



At your request, Mr. Houlahan spoke to the plant manager, who confirmed categorically that he had not spoken to any of the employees regarding the proposed wage package in the agreement nor any 40¢ per hour increase without involvement in the union. Mr. Houlahan asked the plant manager whether he had heard any rumours as to the employees' attitudes regarding the proposed agreement which was not ratified. The plant manager responded to Mr. Houlahan that he had heard that there was some dissatisfaction regarding the wage proposals and that some individuals apparently did not want the union. This information was communicated to Mr. Houlahan without the plant manager going and speaking to any of the employees. The plant manager in addition was not talking about, nor did Mr. Houlahan communicate to you that the plant manager was talking about any one particular employee.

You apparently had left the plant at this point in time to allow Mr. Houlahan to speak to the plant manager. You re-attended at Mr. Houlahan's office and Mr. Houlahan reported to you the specific details of his conversation with the plant manager as above noted. The plant manager did not indicate to Mr. Houlahan and Mr. Houlahan did not indicate to you that the payment of union dues posed a problem in the mind of any of the employees.

After relaying to you the comments from the plant manager, Mr. Houlahan asked you what it would take in order to implement the agreement and specifically whether the people in testing division were after any specific additional amount of money. You responded that perhaps the extension of the 20¢ bonus to the people in testing might eliminate the opposition to ratification. Based upon this request, Mr. Houlahan indicated that the company would be prepared to pay this 20¢ bonus to the individuals in the testing department as well.

Based upon your desire to hold a second ratification vote, Mr. Houlahan on behalf of the company agreed to the following:

- (a) shutting down plant production to allow for a ratification vote;
- (b) giving you and the members of the bargaining unit access to the company board room in order to conduct the vote;
- (c) giving you additional time to speak beforehand with a probationary employee, as you indicated your wish to have such employee participate in the ratification vote.

The second ratification vote was held and it was apparently unsuccessful. After this second vote, you advised Mr. Houlahan that it appeared his information was correct to the extent that there were people who didn't want the union.

At some point in time after the second ratification vote, your office indicated that you were not satisfied with the present wording of Appendix "B" dealing with arbitrators. I don't know what specifically the concern of your office is in this matter.

*As to the company's position regarding execution of the draft Collective Agreement, I would reiterate the comments as set forth in the last paragraph on page 2 of my letter dated September 9, 1987.*

I hope this clarifies this matter.

[emphasis added]

13. Mr. Houlahan told the Board that Mr. Kane's letter of September 9th did not accurately reflect the respondent's position and that he had not discussed it with Mr. Kane. However, he also testified that he reviewed Mr. Charron's letter with Mr. Kane and gave him instructions for replying before Mr. Kane sent his letter of October 7th. The letter of October 7th confirms the respondent's position as stated in the last paragraph of the letter of September 9th, that is, that the respondent would not execute a collective agreement based on the memorandum of settlement because employees had not ratified it. Mr. Houlahan agreed in cross-examination that the respondent would have executed a collective agreement based on the memorandum of settlement if

employees had ratified it at the first ratification vote. He also agreed the respondent would have signed a collective agreement based on the memorandum of settlement together with the change in the tester rate if employees had ratified it at the second meeting and if the problem with the last sentence of Appendix "B" had been resolved. Mr. Houlahan further agreed that he was subsequently advised by the complainant that it was prepared to sign a collective agreement and there were no reservations or conditions attached to the complainant's statement. On October 22, 1987, the instant complaint was filed.

14. On November 18, 1987, the respondent sent the complainant a draft of a new collective agreement. This was identical in all respects to the August 6th draft, together with the change in the tester rate but the term was for only one year rather than three years. The hearing in this matter was scheduled for December 22nd. The respondent applied for a final offer vote under section 40 of the Act on December 17th. At the time of the hearing, that request was outstanding.

15. It is evident both on the basis of Mr. Kane's letters and Mr. Houlahan's testimony that the reason the respondent refused to execute a collective agreement was that employees had not ratified either the memorandum of settlement or the memorandum of settlement together with the tester rate change. It is this refusal which the complainant alleges amounts to a failure to bargain in good faith or to make every reasonable effort to make a collective agreement in violation of section 15.

16. The Board has noted previously that the insistence on ratification by employees on the part of an employer reflects a failure to recognize the union as the body with the exclusive authority to make a collective agreement. As the Board observed in *Wilson Automotive (Belleville) Ltd.* [1980] OLRB Rep. Sept. 1337, a union is not merely an agent of employees:

18. Under *The Labour Relations Act* an employer makes his contract with the union and not with the employees. It is common to refer to a union as a "bargaining agent". A union is, however, much more than a mere agent when it comes to negotiating and administering a collective agreement. A union has an independent legal existence which the employer is bound to respect. This critical distinction was recognized by the Supreme Court of Canada in *McGavin Toastmaster Ltd. v. Ainscough* (1975), 54 D.L.R. (3d) 1. There at p. 6, Laskin C.J.C. adopted the following language of Judson J. in *Syndicat Catholique des Employés de Magasins de Quebec, Inc. v. Compagnie Paquet Ltée* (1959), 18 D.L.R. (2d) 346 at 355:

The union contracts not as agent or mandatory but as an independent contracting party and the contract it makes with the employer binds the employer to regulate his master and servant relations according to the agreed terms.

19. By refusing to accept the union's execution of the collective agreement and insisting on a ratification vote among all of the employees the respondent has in fact refused to recognize the union as the body with the exclusive authority to make a collective agreement. By this failure to recognize the union the employer has violated the most fundamental aspect of its duty to bargain in good faith set out in section 14 [now 15] of the Act. (*De Vilbiss (Canada) Ltd.*, [1976] OLRB Rep. Mar. 49.)

17. The Board added these observations in *The T. Eaton Company Limited*, [1985] OLRB Rep. Aug. 1309:

The company submits that only the employees represented by the union, and not the union's International President, were legally entitled to ratify the proposed collective agreements. This submission is based on the premise that the union's status is only that of an agent of the employees and accordingly the principals with the authority to ratify the memoranda must have been the employees. We do not agree. While it is true that when a union is certified to represent a unit of employees it becomes the "exclusive bargaining agent" of the employees, it is more than simply an agent of the employees. Rather, so long as it continues to hold bargaining rights, it

has a status independent of the employees and deals with the employer, and enters into collective agreements, in its own right....

18. There is no requirement under the *Labour Relations Act* for ratification by employees. This absence is highlighted by the fact that section 72 specifies only the manner in which a ratification vote must be held. It was not suggested that the ratification vote here did not comply with section 72. In addition Mr. Charron testified that there was nothing in the complainant's constitution or by-laws requiring ratification, although the complainant normally holds ratification meetings as a matter of course. However sound that practice may be, the Board has made it clear that an employer is not entitled to insist upon it as a requirement before signing a collective agreement. To do so amounts to an implicit repudiation of the union's bargaining rights. Accordingly, the Board has found in a number of cases that an employer who requires employee ratification has violated section 15.

19. In *Wilson Automotive, supra*, the Board said as follows:

19. By refusing to accept the union's execution of the collective agreement and insisting on a ratification vote among all of the employees, the respondent has in fact refused to recognize the union as the body with the exclusive authority to make a collective agreement....

20. ...The union's bargaining rights therefore continue in full force and effect. Whatever reservations the employer may have, it is not entitled to doubt or deny these rights at the bargaining table.

21. By not making a better offer and then insisting on a ratification vote of all employees, the employer would set the stage for a plebiscite calculated to undermine the union. The most plausible inference to be drawn from the employer's conduct is that it wants the vote on its offer among the employees to be a vote of non-confidence in the union so overwhelming as to effectively terminate the union's bargaining ability, if not its bargaining rights....

Similarly, in *Northwest Merchants Limited Canada*, [1983] OLRB Rep. July 1138 the Board said "[i]t is well established in the Board's jurisprudence that an employer cannot legally insist on employee ratification of collective agreement proposals..." except to the extent permitted by section 40 (Indeed, in some circumstances, the Board went on to say, a request under section 40 may also be considered an unfair labour practice.) See also *Treco Machine & Tool Limited*, [1982] OLRB Rep. Dec. 1954 and *Fotomat Canada Limited*, [1981] OLRB Rep. Feb. 145.

20. The respondent in this case argued that there was no collective agreement in existence and supported this argument with a number of cases and contract law authorities directed at the issue of when a contract or a collective agreement comes into being. However, the complainant did not argue that the memorandum of settlement constituted a collective agreement in itself, and that was not the issue before the Board. Rather, we were called upon to decide whether the respondent's refusal to execute a collective agreement based on the memorandum of settlement or the memorandum together with the change in the tester rate was a failure to bargain in good faith or to make every reasonable effort to conclude a collective agreement. In addressing that matter, we are prepared to assume, without finding, that the memorandum of settlement *per se* was not a collective agreement within the meaning of the *Labour Relations Act*.

21. To some extent, these arguments were also directed at denying the existence of an agreement of any kind. Rather, counsel for the respondent argued that there were two offers which were rejected by employees, the first being the memorandum of settlement and the second being the memorandum as amended by the change in the tester rate. This position is not supported by either the documentation filed or the testimony of both Mr. Charron and Mr. Houlahan. The memorandum of settlement, Mr. Kane's letters, and Mr. Houlahan's evidence make it clear that



there was a full settlement of all matters in dispute between the parties as of July 28, 1987. The first paragraph of the memorandum of settlement recites in part the following:

The undersigned representative of both the Company and the Union agree to the following basis of settlement of all matters in dispute as witnessed by the undersigned Conciliation Officer of the Ministry of Labour....

The memorandum also is signed on behalf of both parties by Mr. Charron and Mr. Houlahan among others. To characterize the memorandum as an outstanding offer to employees reflects the same misconception about the union's role which the jurisprudence described above addresses. Similarly, the change in the tester rate was not an offer made to employees; it was an offer made to the union in the person of Mr. Charron and there was no dispute that Mr. Charron agreed to it. The fact that Mr. Houlahan made the offer and Mr. Charron agreed to it in the hope that employees would find the amended package more acceptable does not mean it was merely an expired offer once it became clear that employees voted against it.

22. Even if we were to accept the respondent's position in this regard, it was not suggested that the lack of an agreement could absolve the respondent of responsibility under section 15. (Indeed the Board has said that the withdrawal of an offer may constitute a violation of section 15 in certain circumstances.) What the respondent argues is that the state of affairs between these parties was so unclear and unresolved as to entitle the respondent to refuse to sign a collective agreement. In this regard counsel points to the disagreement with respect to the last sentence of Appendix "B".

23. We find this disagreement something of a red herring. It was apparent from the evidence that the respondent did not refuse to sign a collective agreement because of a difference of opinion with respect to Appendix "B", but rather because employees had not ratified either the memorandum of settlement in its original form or as subsequently amended by the parties. In fact, Appendix "B" was not an outstanding issue which was left unresolved on July 28, 1987. It was not disputed that as of that date, the parties thought they were in agreement on every item. This is evident not only from the terms of the memorandum of settlement but also from Mr. Kane's letter of September 9th which states that the parties had agreed on all the terms of the proposed collective agreement. It is true that the respondent was to supply the list of arbitrators referred to in article 8.05. However, this was not a case where the parties would then discuss and attempt to agree upon a final list of arbitrators. Rather, it was apparent from the evidence that it was agreed that the respondent was to unilaterally supply the list. What the respondent now alleges is that on July 28, 1987, the parties also agreed to have the arbitrators on that list sit in rotation, an agreement which the union disputes. This is a factual dispute as to whether the last line of Appendix "B" was agreed to on July 28th or not, which we are prepared to determine should it become necessary with respect to the matter of remedy. But it was not suggested that as of July 28th, the parties had left the issue of rotation outstanding in the sense that it was to be discussed or agreed upon at some later time. Nor could it be said that it was a lack of clarity on this issue or any other which formed the basis of the respondent's refusal to execute the collective agreement. Both Mr. Houlahan's testimony and Mr. Kane's letters leave no doubt that the reason the respondent refused to sign the collective agreement was that employees had not ratified the settlement.

24. The parties were also in dispute with respect to the conclusions we should draw from the strike vote, with the complainant arguing that it amounted to a *de facto* acceptance of the settlement by employees and the respondent disputing that proposition. We found this dispute to be of little assistance in our conclusions. The uncontradicted evidence was that Ms. Amigao made it clear to employees that voting against a strike meant accepting the settlement. But even if this had not been the case, and if it could be said that employees had voted against a strike in a vacuum, the

Board's jurisprudence makes it clear that a respondent was not entitled to refuse to sign a collective agreement on the basis that employees had not accepted the settlement.

25. The respondent also argued that having held two ratification meetings, the complainant was estopped from claiming that ratification was not a necessary precondition to entering into a collective agreement. We do not share that view. The Board has suggested in the past that employee ratification of a collective agreement is a wise practice in some circumstances and both parties' attempts to agree upon a settlement which would be acceptable to employees reflects the recognition that this is desirable from a practical labour relations point of view. However, it did not amount to an assurance by the complainant that ratification was necessary or required, and without that ingredient, it cannot be said an estoppel has been made out.

26. In view of our decision with respect to section 15, it was not necessary for the Board to address the complainant's allegations with respect to section 64 and section 67. We also note that while the respondent advised us that it had applied for a vote under section 40 of the Act, neither party directed any arguments to this event. We therefore did not find it necessary to address the respondent's section 40 vote request at this point in time.

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**2241-86-R** The Society of Ontario Hydro Professional and Administrative Employees, Applicant, v. **Ontario Hydro**, Respondent; Canadian Union of Public Employees - C.L.C. Ontario Hydro Employees Union Local 1000, Intervener; The Coalition to Stop Certification of the Society on behalf of certain employees, Tom Stevens, C. A. Stevenson, and Michelle Morrissey-O'Ryan and George Orr on behalf of certain objecting employees, Objectors

**Certification - Constitutional Law - Whether there is a category of employees of Ontario Hydro who are employed on or in connection with works which by section 17 of the *Atomic Energy Control Act* have been declared to be works for the general advantage of Canada - Board finding such a category exists and therefore Board having no jurisdiction to include these persons in any bargaining unit**

**BEFORE:** *Owen V. Gray*, Vice-Chair, and Board Members *G. O. Shamanski* and *B. L. Armstrong*.

**APPEARANCES:** *Maurice A. Green* and others for the applicant; *F. G. Hamilton* and others for the respondent; *R. Wells* and others for the intervener; *A. M. Robinson* and others for the employee objectors presented by the Coalition to Stop the Certification of the Society; no one for the other objectors.

**DECISION OF THE BOARD;** February 25, 1988

1. This proceeding concerns an application under the *Ontario Labour Relations Act* ("the Act") by the Society of Ontario Hydro Professional and Administrative Employees ("the Society") for certification as exclusive bargaining agent for a unit of administrative, scientific and professional engineering employees of Ontario Hydro ("Hydro"). This decision addresses the ques-

tion whether some of these employees fall within federal jurisdiction for labour relations purposes and are, therefore, beyond the scope of this application.

### **How the Constitutional Issue Arose**

2. The Society's application was filed in November 1986. In it, the Society requested that a prehearing representation be conducted. At the conclusion of a hearing held on March 27, 1987 to give the applicant the opportunity to show cause why we should not do so (see [1987] OLRB Rep. Mar 419), we refused that request (for reasons delivered later and reported at [1987] OLRB Rep. Dec. 1589). We then invited and considered the parties' submissions on the manner in which the several complex substantive issues in this application should be heard. We concluded that we should first hear and determine two issues: whether the applicant is a trade union within the meaning of clause 1(1)(p) of the Act and, if it is, whether section 13 of the Act prevents its certification. The parties were directed to exchange statements of material fact and documents relied upon in connection with these two issues ("the status questions"). (The details of that initial procedural direction were confirmed in an unreported decision dated June 25, 1987.)

3. The constitutional issue addressed here was first raised in the statement of material fact filed on August 21, 1987, on behalf of certain affected employees by the Coalition to Stop the Certification of the Society ("the Coalition"). (The Coalition is an unincorporated association whose members are, it claims, employees affected by this application. It is not a trade union and does not itself have any interest in this application distinct from the interests of those members. It seeks in this application to represent the interests of those members by opposing this application. Earlier in the proceedings, there was some question whether it and, hence, the solicitor it has retained, could properly claim authority to speak for every one of the persons it claims to be members and whether, in any event, it is itself a proper party to this application. It was clear, however, that at least some persons - the members of its executive who attended the Board's hearings - were affected by this application and did authorize the Coalition and its solicitor to act on their behalf in this matter. While it is technically they, and not the Coalition, who have standing to intervene as objectors, none of the other parties objected to the Board's indulging the Coalition's desire to appear by name in the title of this proceeding, as it now does. It should be noted, however, that the Coalition's standing in this proceeding is only as agent for certain affected employees.)

4. On grounds we describe in paragraph 7, the Coalition asserted that:

... all employees including shift supervisors, shift trade supervisors, engineers, scientists and other persons employed in positions not known to the Coalition at Pickering A and B, Bruce A and B Darlington Construction Site, Rolphton and the Research Division are employees to which the Canada Labour Code governs [sic] their labour relations with their employer.

Pickering A and B, Bruce A and B, and Rolphton are nuclear generating stations. Nuclear generating stations are under construction at the Darlington Construction Site.

5. For reasons set out in our decision of September 21, 1987, we decided that we would hear the parties' evidence and argument with respect to this constitutional issue before commencing our hearings with respect to the status questions. Having regard to the particular importance of the issues raised, we also decided that in this case the Board would give notice to the Attorneys-General of Ontario and Canada that we would be addressing this issue. They both declined the opportunity to participate. Those who did participate in our hearings on this issue (held October 19, 20, 27 and 28 and November 3, 1987) agreed at the outset that at this stage we should consider only whether there is a category of employee of Ontario Hydro, definable by reference to the words of section 17 of the *Atomic Energy Control Act*, whom we would have no jurisdiction to



include in a bargaining unit in this application, without attempting to identify all of the employees who may fall within any such category. That, then, is the question we address here.

### Positions of the Parties

6. The preamble to and section 17 of the *Atomic Energy Control Act*, R.S.C. 1970 c.A-19 as amended, provide:

WHEREAS it is essential in the national interest to make provision for the control and supervision of the development, application and use of atomic energy, and to enable Canada to participate effectively in measures of international control of atomic energy which may hereafter be agreed upon;...

17. All works and undertakings whether hereinbefore or hereafter to be constructed,

- (a) for the production, use and application of atomic energy;
- (b) for research or investigation with respect to atomic energy; and
- (c) for the production, refining or treatment of prescribed substances,

are and each of them is declared to be works or a work for the general advantage of Canada.

Sections 91 and 92 of the *Constitution Act*, 1867 provide, in part, as follows:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainly, but not so as to restrict the generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is say,-

...

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of Classes of Subjects enumerated in this section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects this Act assigned exclusively to the Legislatures of the Provinces.

92. In each Province the Legislature may exclusively make laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,-

...

10. Local Works and Undertakings other than such as are of the following Classes:-

...

(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

Sections 2 and 108 of the *Canada Labour Code*, R.S.C. c. L-1, provide, in part:

## 2. In this Act

"federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of the Parliament of Canada, including without restricting the generality of the foregoing:

108. This Part applies in respect of employees who are employed upon or in connection with the operation of any federal work, undertaking or business and in respect of the employers of all such employees in their relations with such employees and in respect of trade unions and employers' organisations composed of such employees or employers.

7. The coalition's position is simply that, having regard to the combined effect of subsections 91(29) and 92(10)(c) of the *Constitution Act, 1867*, the declaration in section 17 of the *Atomic Energy Control Act* brings works of the sort it describes within exclusive federal jurisdiction. Accordingly, labour relations with respect to persons employed upon or in connection with such works is covered by the *Canada Labour Code*, R.S.C., c.L-1, by virtue of sections 2 and 108 thereof.

8. Ontario Hydro takes the position that its labour relations with all of its employees fall within provincial jurisdiction and that the Ontario *Labour Relations Act* governs with respect to all but those of its employees who are expressly excluded by the provisions of that Act. Hydro has taken that position for many years, and relies on the fact that there has never been any challenge to it. It says that the declaration in section 17 of the *Atomic Energy Control Act* does not apply to it as a matter of interpretation and cannot apply as a matter of constitutional law. With respect to the latter point, it says that there is no national interest in peaceful uses of atomic energy other than with respect to the physical security of fissionable substances and protection of the public from radiation dangers, so that federal jurisdiction cannot extend beyond those matters. It says the declaration cannot affect its facilities because of section 92A of the *Constitution Act*, subsection (1) of which provides, in part:

92A. (1) In each province, the legislature may exclusively make laws in relation to

- (a) exploration for non-renewable natural resources in the province;
- (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and,
- (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

Hydro also relies on section 117 of the *Constitution Act* for the proposition that it cannot be affected by the declaration because it is owned by the province of Ontario. Section 117 of the *Constitution Act* provides:

117. The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the Country.

Finally, Hydro says that even if Parliament has constitutional jurisdiction over the works which are the subject of the declaration and over labour relations involving persons employed on or in connection with those works, it has not occupied the latter field with respect to employees of Provincial Crown corporations. This argument is based on the language of section 109 of the *Canada Labour Code*, which provides, in part:

109. (1) This Part applies on respect of any corporation established to perform any function or duty on behalf of the Government of Canada and in respect of employees of any such corporation....

(4) Except as provided by this section, this Part does not apply in respect of employment by Her Majesty in right of Canada.

Ontario Hydro does not argue that it is a Crown agent.

9. Canadian Union of Public Employees - C.L.C., Ontario Hydro Employees Union Local 1000 ("OHEU"), represents a very large unit of employees of Ontario Hydro. Hydro's labour relations with some of those employees might also be said to fall within federal jurisdiction on the grounds advanced here by the Coalition. It participated in the hearing of the constitutional argument without objection by any of the other participants. At that hearing, OHEU's position on the constitutional issue was the same as Hydro's. Before the hearing, OHEU had asserted that, because Ontario Hydro is a provincial Crown corporation, it could not be bound by the *Canada Labour Code* or the *Atomic Energy Control Act* unless those statutes expressly stated that the Crown was bound thereby. OHEU abandoned that argument when the hearing commenced. OHEU does not say that Ontario Hydro is a Crown agent.

10. After the constitutional issue arose and it was required to take a position on it, the Society observed (as both Hydro and OHEU had) that it would make no labour relations sense to divide Hydro's labour relations with its employees into federal and provincial components. It said it would not have raised the constitutional issue. Having had to consider whether the Coalition's proposition was legally correct, however, it had concluded, and took the position, that it was.

11. The Coalition having announced that it would not introduce any evidence in support of its constitutional argument, the Society proposed to do so. Counsel for the Society observed that the history and results of litigation about labour relations jurisdiction over Northern Telecom installers (see *Northern Telecom Ltd., v. Communications Workers of Canada*, [1980] 1 S.C.R. 115 ("Northern Telecom #1") and *Northern Telecom Ltd. v. Canadian Union of Communications Workers*, [1983] 1 S.C.R. 733 ("Northern Telecom #2")) made clear the importance of developing the relevant constitutional facts before the Board at first instance. As the issue had been raised and had to be decided, he said, the Society wished to ensure that the decision is made on an adequate factual foundation.

12. Counsel for Hydro and OHEU took exception to the applicant's adopting a position which would alter the unit it had applied for. They argued that the Society should be prevented from doing so. We rejected that argument. The applicant does not say that all of the employees it seeks to represent fall within federal jurisdiction. Its position is that *some* of the employees whose inclusion in the bargaining unit affected by this application would be appropriate on general principles nevertheless cannot be included because Hydro's labour relations with them fall within federal jurisdiction. In other words, the constitutional issue circumscribes the bargaining unit about which this or any application entertained by this Board could be concerned. At this stage of a certification application, the Board does not generally prevent an applicant from altering its position on a matter affecting bargaining unit composition, particularly when the change is to agree with a position advanced by another party in response to the application. Furthermore, it would make no more sense for us to constrain the applicant in asserting a constitutional argument than it would have if we had refused to entertain the Coalition's argument because of its delay in raising it, something which no-one suggested we should do. Excluding the constitutional issue from these proceedings would not have immunized the result or the parties' labour relations from its influence. Once an issue of this sort is raised, it is best that it be dealt with fully.



## The Facts

13. Ontario Hydro is a corporation owned by the Province of Ontario. Its affairs are governed by the *Power Corporation Act*, R.S.O. 1980, c. 384 as amended. Section 56 of that Act provides that the purposes and business of the corporation include the generation, transmission, distribution, supply, sale and use of electrical power. The corporation employs approximately 32,000 people. It has assets of close to \$30 billion. The Darlington nuclear facilities now under construction are valued at approximately \$11 billion. Darlington and other nuclear facilities together approach \$20 billion in value.

14. Hydro has 68 generating stations: 5 nuclear, 10 thermal and the balance hydraulic. The nuclear, thermal and hydraulic stations provide roughly 42, 26 and 32 percent, respectively, of the corporation's total electrical power generating capacity. (The absolute and relative amounts of electrical power actually generated by these three types of generating station vary with water levels, maintenance requirements, demand, and operating and economic considerations.) Once generated, electrical power is distributed throughout the province through approximately 230 transformer stations and 770 distribution stations to some direct industrial and rural customers and to the municipal public utilities commissions which distribute electricity to the vast majority of end users of electricity in the province.

15. The generators which make electricity in each of the three types of generating stations are driven by turbines. Moving water drives the turbines in hydraulic generating stations. Steam drives the turbines in both thermal and nuclear generating stations. In thermal stations, the heat used to generate the steam is created by burning fossil fuels, generally coal. In nuclear stations, a CANDU reactor generates the necessary heat. The way it does that is described this way in a Hydro handout entitled *The Nuclear Story*:

Ontario Hydro's Candu reactors, which use natural uranium as fuel, are producers of heat. They do the same job as coal, oil or natural gas in the generation of electricity - producing heat to convert water into steam, which spins a turbine - generator to make electricity.

Unlike coal, oil or natural gas, however, there is no combustion in the nuclear reactor.

The story of nuclear power centres on one of nature's basic building blocks - the atom.

Atoms have a core, or nucleus, made up of particles called protons and neutrons around which electrons orbit.

To give some idea of the size of these particles, it would take approximately 1,000 billion neutrons placed side by side in a single line to cross the head of a pin.

Uranium consists of three types of atoms, identified as U-238, U-235 and U-234. The "U" stands for uranium and the figures are simply the total number of protons and neutrons in the nucleus of the atom.

In nature, uranium contains more than 99 per cent U-238, 0.7 per cent U-235 and a trace of U-234. These proportions remain the same when the uranium is processed into ceramic uranium dioxide fuel pellets used in Candu reactors. The pellets are sealed in zirconium alloy sheaths which are then assembled into fuel bundles for use in the reactor.

But that's only a beginning. Nuclear-electric power relies on the splitting of the U-235 nucleus in a process called fission.

In nature, a few U-235 nuclei split spontaneously, and neutrons break loose. If one of these neutrons hits another U-235 nucleus, the collision makes that nucleus so unstable it splits almost

instantly into two smaller nuclei, called fission products, releasing more neutrons and large amounts of heat.

Two or three neutrons are released in each fission. If these neutrons can split other U-235 nuclei which, in turn, give off more neutrons and heat, then a chain reaction is created ensuring a steady supply of heat for electricity production.

However, neutrons given off by the occasional spontaneous fission in the uranium fuel are travelling too fast (up to 42 000 km a second) to split other atoms readily.

To get a chain reaction, something must slow down the neutrons to about 3 km a second, so they will be more likely to strike and split the U-235 nuclei in the uranium.

Such a neutron “brake” is called a moderator.

All Ontario Hydro reactors are the unique Candu type developed jointly by Atomic Energy of Canada Limited and Ontario Hydro to produce power from natural uranium.

Candu stands for CANada Deuterium Uranium. These reactors use deuterium oxide (heavy water) as the moderator to slow down the neutrons. Heavy water occurs in nature as one part in 7,000 of ordinary water and weighs about 10 per cent more.

So the essential ingredients of a chain reaction are the collection of enough uranium so that the number of fissions increases to the desired level for a given heat output, and enough heavy water to slow down the neutrons efficiently so they are more likely to strike U-235 nuclei and cause fission.

In essence, the Candu reactor consists of a large heavily-shielded tank called a calandria. Several hundred pressure tubes pass through the tank and bundles of zirconium-sheathed uranium fuel elements are located in these tubes. For example, each reactor at the Pickering Generating Station, just east of Toronto, contains approximately 4,600 fuel bundles.

As nuclear energy is released in the form of heat, a separate circuit of heavy water transports the heat from the fuel in the pressure tubes to heat exchangers (boilers) where steam is made to drive the turbines.

As noted earlier, there is no combustion in uranium fuel, and a fuel bundle comes out of the reactor looking the same as when it went in.

However, there is one important difference. When a fuel bundle is removed from the reactor after about 18 months of use, it contains radioactive by-products as a result of the fission process.

16. The uranium fuel bundles used by Hydro in its CANDU reactors are produced by other companies. The uranium in them could not be used in atomic weapons without undergoing further refining to enrich one of the isotopes. Used fuel bundles contain plutonium, a radioactive material which, in pure form, can be used in weapons or as a nuclear fuel. Extraction of pure plutonium requires what Hydro’s witness described as “a national effort”: substantial resources which Hydro does not have. Uranium and plutonium are “prescribed substances” under the *Atomic Energy Control Act*.

17. Deuterium is a non-radioactive isotope of hydrogen. Deuterium oxide, or “heavy water”, is present in very small quantities in ordinary water (hydrogen oxide). Hydro has its own facility for extracting heavy water from lake water. Although this facility was originally intended only to supply Hydro’s own needs for heavy water, its production is currently in excess of those needs. Hydro is in the business of selling the excess, at a profit. Sales of heavy water generate a very small part of Hydro’s total revenue. Deuterium and its compounds are “prescribed substances” under the *Atomic Energy Control Act*.

18. Hydro also uses its CANDU reactors to produce cobalt-60, a radioactive substance which is sold for use as a source of gamma radiation for sterilizing medical supplies, cancer therapy and long-term food preservation. Most of the cobalt-60 in use in the world came from Ontario Hydro reactors. It is produced by sealing natural cobalt in adjuster rods which hang in the reactors while they are operating. Use of cobalt in these rods is not essential to the CANDU process; other metals could be used in its place. The production and sale of cobalt-60 does not generate a profit for Hydro. Hydro is simply responding to demand for a worthwhile substance which it is in a position to produce. Cobalt-60 is a "prescribed substance" under the *Atomic Energy Control Act*.

19. The heavy water used as a moderator in CANDU reactors is exposed to neutrons, which convert some of the deuterium in it into tritium (or hydrogen-3), a radioactive isotope of hydrogen. One of the facilities at Darlington is a plant which extracts tritium oxide from heavy water which has been used in a CANDU reactor. While its doing so has been discussed, Hydro does not currently have a licence to sell tritium or its compounds. Tritium and its compounds are "prescribed substances" under the *Atomic Energy Control Act*.

20. Regulations made under the *Atomic Energy Control Act* provide that no person may operate a reactor except pursuant to a license issued by the Atomic Energy Control Board ("the AECB"), a body established by that Act. Each of Hydro's reactors is covered by a license issued by the AECB. Portions of the licence for Bruce Nuclear Generating Station "A" were put before us as representative of provisions found in all such licences. That license imposes requirements with respect to the way Hydro operates the facility, Hydro's radiation protection measures and emergency procedures and the measures it takes with respect to physical security of fissionable substances and of the facility itself. The license also dictates minimum staffing levels in the control room, requires written AECB approval of personnel in certain positions at the facility (including those in positions affected by this application) and prescribes generally that significant changes in staffing and organization of the facility require prior notice to and the written permission of the AECB.

21. The Society introduced evidence about discussions and arrangements between the AECB, Labour Canada, the Ontario Ministry of Labour and Ontario Hydro concerning the handling of radiological and non-radiological health and safety issues, complaints and work refusals occurring at Hydro's nuclear facilities. The apparent object of this evidence was to demonstrate recognition by the participants that federal jurisdiction in those areas went beyond the radiological matters to which federal authorities had limited themselves. Whether the evidence demonstrates that or not, it can be of no assistance in assessing the constitutional question before us. The provisions of the *Constitution Act* determine the scope of federal and provincial legislative authority, not the behaviour or beliefs of government ministries or of those who may be affected by the exercise of such authority. For the same reason, we are not assisted by the observation (however correct it may be) that no assertion of federal authority over Ontario Hydro's labour relations with any of its employees has ever before been made in the many years during which the alleged grounds for such authority have existed. As Madam Justice Reed observed in *Re Alberta Government Telephones and Canadian Radio-Television and Telecommunications Commission et al.* (1985), 15 D.L.R. (4th) 515 (F.C.T.D.) at page 538:

The fact that constitutional jurisdiction remains unexercised for long periods of time or is improperly exercised for a longer period of time, however, does not mean that there is thereby created some sort of constitutional squatters rights: refer *A. -G. Man. v. Forest* (1979), 101 D.L.R. (3d) 385, 49 C.C.C. (2d) 353, [1979] S.C.R. 1032, for a case in which unconstitutional action had remained unchallenged for 90 years.



## Constitutional Jurisdiction Over Labour Relations

22. The division of federal and provincial jurisdiction over labour relations is the subject of a large body of jurisprudence, which was summarized by Mr. Justice Dickson (as he then was) in *Northern Telecom #1*, *supra*, at pp. 131-133:

The best and most succinct statement of the legal principles in this area of labour relations is found in Laskin's *Canadian Constitutional Law*, 4th ed. (1975), p. 363:

In the field of employer-employee and labour-management relations, the division of authority between Parliament and provincial legislatures is based on an initial conclusion that in so far as such relations have an independent constitutional value they are within provincial competence; and, secondly, in so far as they are merely a facet of particular industries or enterprises their regulation is within the legislative authority of that body which has power to regulate the particular industry or enterprise ...

In an elaboration of the foregoing, Mr. Justice Beetz in *Montcalm Construction Inc. v. Minimum Wage Com'n et al.* (1978), 93 D.L.R. (3d) 641, [1979] 1 S.C.R. 754, 25 N.R. 1, set out certain principles which I venture to summarize:

(1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.

(2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.

(3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.

(4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.

(5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.

(6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern", without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.

23. Here, the basis for assertion of federal jurisdiction over labour relations is the exercise, in section 17 of the *Atomic Energy Control Act*, of the declaratory power given to Parliament by section 92(10)(c) of the *Constitution Act*. It is well settled that, by virtue of section 91(29) of the *Constitution Act*, Parliament has the same jurisdiction over works falling within the description in section 92(10)(c) as if that description appeared as one of the classes of subjects expressly enumerated in section 91: *Montreal v. Montreal Street St. Ry.*, [1912] A.C. 333 per Lord Atkinson at p. 342; *Re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304 ("the Radio Reference") at p. 314; *A.-G. Ont. et al. v. Winner, Winner et al. v. S.M.T. (Eastern) Ltd.*, [1954] A.C. 541 per Lord Porter at p. 568. Thus, Parliament has exclusive legislative authority with respect to matters concerning such otherwise local works as it declares to be for the general benefit of Canada. Mr. Justice Duff made these observations about this declaratory power in *Reference Re Waters and Water Powers*, [1929] S.C.R. 200 at page 220:

The authority created by s. 91(10)(c) is of a most unusual nature. It is an authority given to the

Dominion Parliament to clothe itself with jurisdiction -- exclusive jurisdiction -- in respect of subject over which, in the absence of such action by Parliament, exclusive control is, and would remain vested in the Provinces. Parliament is empowered to withdraw from that control matters coming within such subjects, and to assume jurisdiction itself. It wields an authority which enables it, in effect, to rearrange the distribution of legislative powers effected directly by the Act, and, in some views of the enactment, to bring about changes to the most radical import, in that distribution; and the basis and condition of its action must be the decision by Parliament that the "work or undertaking" or class of works or undertakings affected by that action is "for the general advantage of Canada," or of two or more of the Provinces, which decision must be evidenced and authenticated by a solemn declaration, in that sense, by Parliament itself.

(With respect to the declaratory power generally, see V.C. MacDonald, "Parliamentary Jurisdiction By Declaration", [1934] 1 D.L.R. 1 (Annotation); P. Schwartz, "Fiat By Declaration - s. 92(10)(c) of The British North America Act", (1960) 2 Osgoode Hall Law Journal 1; K. Hanssen, "The Federal Declaratory Power Under The British North America Act", (1968) 3 Manitoba Law Journal 87; P. Hogg, *Constitutional Law of Canada* (2nd ed., Carswell, 1985) at pp. 491-493; and, N. Finkelstein, *Laskin's Canadian Constitutional Law* (5th ed., Carswell, 1986) at pp. 627-631.)

24. In *Re Legislative Jurisdiction over Hours of Labour* [1925] S.C.R. 510, Mr. Justice Duff wrote at p. 511 that:

It is now well settled that the Dominion, in virtue of its authority in respect of works and undertakings falling within its jurisdiction, by force of s. 91(29) and s. 92(10), has certain powers of regulation touching the employment of persons engaged on such works or undertakings.

In *Reference Re Validity of Industrial Relations and Disputes Investigation Act (Can.), and Applicability In Respect of Certain Employees of Eastern Canada Stevedoring Co. Ltd.*, [1955] 3 D.L.R. 721 (S.C.C.) ("the Stevedoring case"), the Supreme Court of Canada dealt with a reference to it of two questions, one of which was whether the *Industrial Relations and Disputes Investigation Act*, R.S.C. 1952, c. 152, was ultra vires in whole or in part. Like the current *Canada Labour Code*, that statute purported to apply to employees employed "upon or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada including ... (g) such works or undertakings as, although wholly situate within a province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces." In their nine separate judgments, each of the members of the court found the Act to be valid federal legislation. Several commented that this conclusion rested on an expectation that certain language in the statute, such as the phrase "in connection with", would be construed so as to truly confine its application to works and undertakings within federal jurisdiction. Of those who observed that the jurisdiction supportive of subparagraph (g) was to be found in the interplay of section 92(10)(c) and section 91(29), only Justices Rand and Kellock observed (at pages 746 and 751, respectively) that the words "or undertakings" in (g) are not present in section 92(10)(c). Mr. Justice Rand said (at p. 746) that "Undertakings, existing without works, do not appear in section 92(10)(c) and cannot be the subject of such a declaration."

25. The question we must address here can be put this way: is there a federal work or undertaking upon or in connection with which Ontario Hydro employs any of the employees affected by this application? As the foregoing demonstrates, that question turns, at least in part, on the applicability and constitutional validity of the declaration in section 17 of the *Atomic Energy Control Act*.

#### **Applicability and Constitutional Validity of section 17 of The Atomic Energy Control Act**

26. Section 2 of the *Atomic Energy Control Act* defines "atomic energy" as "all energy of

whatever type derived from or created by the transmutation of atoms.” The fission of atoms of uranium-235 is a “transmutation of atoms” in the sense intended by that definition. As indicated in the Hydro document quoted in paragraph 15, heat is created in a CANDU reactor by the fission of uranium-235 in a controlled chain reaction. Heat is a type of energy. That energy is used in a process which produces electricity. Clearly, then, Hydro’s CANDU reactors “produce” and “use” “atomic energy” within the meaning of section 17 of the *Atomic Energy Control Act*. Hydro’s CANDU reactors also “produce” prescribed substances, and the Hydro facilities described in paragraphs 17 and 19 “refine” prescribed substances, within the meaning of that section. The language of section 17 does, therefore, encompass certain Hydro facilities. Is that effective to bring those facilities within a class of subjects over which Parliament has legislative jurisdiction?

27. Its counsel characterizes Ontario Hydro as an “undertaking” engaged in the production, distribution and sale of electricity, not a “work” constructed for any of the purposes outlined in subparagraphs (a), (b) and (c) of section 17 of the *Atomic Energy Control Act*. He argues that the object of a constitutionally valid exercise of the declaratory power must be a “work”, not an “undertaking” and, he adds, not a “work” which forms part of an “undertaking.” He cites the judgment of the Privy Council in the *Radio Reference*, *supra*, at page 315 with respect to the distinction between “works”, which had been described in *Montreal v. Montreal Street St. Ry.*, *supra*, as “physical things, not services”, and an “undertaking”, which is described as “not a physical thing, but an arrangement under which ... physical things are used.”

28. Neither the Coalition nor the Society argued that the declaration in section 17 of the *Atomic Energy Control Act* sweeps in all of Ontario Hydro. The focus was on certain of Hydro’s facilities. The question under consideration is not whether Ontario Hydro is, in its entirety, a work of a sort described in section 17 of the *Atomic Energy Control Act*, but whether Ontario Hydro employs persons upon or in connection with such a work or works.

29. A declaration in exercise of the power under section 92(10)(c) of the *Construction Act* must operate upon a “work” or “works”: *Jorgenson v. Attorney-General of Canada* (1971), 18 D.L.R. (3d) 297 (S.C.C.) at p. 299; and, the *Stevedoring* case per Duff, J., at p. 746. Although the point may not have been authoritatively settled, we approach the question at hand on the basis that the omission of the word “undertaking” from section 92(10)(c) does put a limit on the declaratory power which cannot be overcome by Parliament’s declaring an “undertaking” to be a “work” (see P. Schwartz, *op. cit.* at pp. 9 and 10). It follows that an undertaking without works could not be the subject of a declaration under section 92(1)(c). It does not follow, however, that the use of a “work” in an “undertaking” isolates the work from the exercise of the declaratory power.

30. The *Radio Reference* was concerned with the applicability of section 92(10)(a) of the *Constitution Act* to communications between radio transmitters and radio receivers. The Privy Council’s articulation of a distinction between “works” and “undertakings” was in response to an argument that the entire phrase “works and undertakings” in section 92(10)(a) referred only to physical things. That decision is not authority for the proposition that physical things cease to be “works” when used in an “undertaking.” “Works” which are used by and form part of an “undertaking” can be the subject of an effective declaration under section 92(10)(c). Indeed, Parliament’s exclusive legislative authority with respect to such declared works extends to regulation of the use and management of the works in the operation of the undertaking. This is illustrated by decisions involving the exercise of federal jurisdiction over grain elevators.

31. In *The King v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434, the Supreme Court of Canada found that Parliament could not regulate the operation of grain elevators (other than those employed in the operation of an otherwise federal undertaking, such as a railway or steamship line



which fell within federal jurisdiction) as part of a scheme to control all trade in grain. In his decision, however, Mr. Justice Duff observed that “[t]here is one way in which the Dominion may acquire authority to regulate a local work such as an elevator; and that is, by a declaration properly framed under section 92(10) of the *B.N.A. Act*.” Parliament took this advice, and thereafter included expansive declarations in legislation enacted to control the grain trade and regulate the use of grain elevators.

32. In *R. v. Thumlert* (1959), 20 D.L.R. (2d) 335, the Appellate Division of the Alberta Supreme Court dealt with a challenge to the conviction of a feed mill operator for failure to record receipt of a shipment of grain in the manner required by the *Canadian Wheat Board Act*. Both the feed mill and the supplier of that shipment of grain were located in Alberta, and the subject grain was sold and consumed entirely within that province. The defendant argued that federal legislation could not apply to these wholly intra-provincial transactions. The court held that the legislation was within the legislative authority of Parliament, even when applied to these intra-provincial dealings, because the feed mill (and others) had been specifically declared by the legislation to be a work for the general advantage of Canada. The Court sustained the conviction, holding that Parliament has the power to legislate with respect to the *operation* of a declared work (per McBride, J. A., at p. 355; per Johnson, J. A., at p. 357.) (It was later settled in *Jorgenson v. Attorney-General of Canada*, *supra*, that a declaration need not identify a work with particularity in order to be effective: a declaration in general form covering works “heretofore or hereafter constructed” is effective with respect to works in existence at the time of the declaration, even if they are not expressly named or identified, and with respect to works which later come into existence, even if they were not under construction or in contemplation at that time. While the issue in that case arose under the *Canadian Wheat Board Act*, the Supreme Court of Canada did say it also had in mind the general language of what is now section 17 of the *Atomic Energy Control Act* in coming to these conclusions: see 18 D.L.R. (2d) at p. 300. That characteristic of the section is not relied upon in this case to support an argument that the section is inapplicable.)

33. We turn to Hydro’s argument that the declaration in section 17 of the *Atomic Energy Control Act* is not constitutionally effective to give Parliament jurisdiction with respect to matters outside what Hydro argues is the only national interest in atomic energy matters: radiation safety and the potential use of atomic energy in weapons. In effect, Hydro argues that an effective declaration gives Parliament jurisdiction to make laws with respect only to *some* matters in relation to the declared works. This is inconsistent with the preamble of section 91, which makes it clear that Parliament has legislative authority with respect to *all* matters coming within the expressly enumerated classes of subjects. As we have already noted, a declaration under section 92(10)(c) has the same effect as if the declared works were expressly described in section 91(29). If the declaration in section 17 of the *Atomic Energy Control Act* is effective with respect to any “works” of Ontario Hydro, it must give Parliament authority to legislate with respect to Hydro’s labour relations with persons employed “on or in connection with” those works, in the sense the quoted words have been interpreted in the constitutional jurisprudence.

34. Must there be an objectively ascertainable national interest in the object of Parliament’s exercise of the declaratory power under section 92(10)(c)? The courts have said that the advisability of making a declaration under section 92(10)(c) is a matter of policy of which Parliament is the sole judge and is not a matter for the courts to decide: *Luscar Collieries Ltd. v. McDonald*, [1925] S.C.R. 460 per Mignault J. at p. 480; *R. v. Thumlert*, *supra*, per McBride J. A. at p. 355. Curial deference to Parliament’s view of the national interest might not protect a colourable exercise of the declaratory power (*R. v. Thumlert*, *supra*, per Ford C.J.A. at p. 337), but it was not specifically argued before us that section 17 of the *Atomic Energy Control Act* is colourable.

35. In *Pronto Uranium Mines, v. Ontario Labour Relations Board et al., Algom Uranium Mines Ltd., v. Ontario Labour Relations Board, et al.*, [1956] O.R. 862 (Ont. H. C.), ("the Pronto case") the issue was whether this Board has jurisdiction to entertain a certification application with respect to employees of companies engaged in the mining and concentrating of uranium ore. It was not disputed that the labour relations of the subject employees would be governed by the federal *Industrial Relations and Disputes Investigations Act* rather than the *Ontario Labour Relations Act* if the *Atomic Energy Control Act* were found to be *intra vires*. After reviewing the provisions of the *Atomic Energy Control Act*, the court observed (at p. 869) that:

The real subject-matter of the legislation is the control of the production of atomic energy and that control is exercised from the stage of discovery of ores up to its ultimate use *for whatever purpose, be it civil or military*.

[emphasis added]

The court found that these were matters of national concern, and that the legislation was therefore within the powers of Parliament to make laws for the peace, order and good government. With respect to labour relations, the court also observed (at pp. 869-70) that:

To paraphrase the language of Rand J. in *Reference re Validity of Industrial Relations and Disputes Investigations Act*, [1955] 3 D.L.R. 721 at pp. 746-7, S.C.R. 529 at p. 554, it would be incompatible with the power of Parliament to legislate with respect to the control of atomic energy for the peace, order and good government of Canada if labour relations in the production of atomic energy did not lie within the regulation of Parliament.

In the *Pronto case*, the court did not consider the effect of the declaration in section 17 of the *Atomic Energy Control Act*.

36. In *Denison Mines Limited v. Attorney-General of Canada*, [1973] 1 O.R. 797 (Ont. H.C.), the court dealt with an application to dismiss an action in which the plaintiff sought a declaration that the *Atomic Energy Control Act* was *ultra vires*. After concluding that it was without jurisdiction to entertain an action for relief against the federal Crown, the Court also assessed whether, as had been fully argued, the plaintiff's statement of claim failed to disclose a cause of action. Assuming the truth of the facts pleaded in the statement of claim, including the assertion that there is considerable demand for uranium oxide for civilian uses but none for military purposes, the court observed (at p. 808) that "Parliament has authority to decide whether a work or class of works if [sic] for the general advantage of Canada", and concluded that section 17 of the *Atomic Energy Control Act* is a valid and proper declaration under section 92(10)(c).

### Section 92A of the Constitution Act

37. The *Pronto* and *Denison Mines* decisions predate the introduction into the *Constitution Act* in 1982 of section 92A. Hydro argues that subsection 92A(1)(c) excludes any federal jurisdiction over its labour relations, as that would conflict with the power of the Province of Ontario to legislate with respect to the management of electrical power generation facilities. If the declaration in section 17 of the *Atomic Energy Control Act* was not *ultra vires* in its application to Hydro before subsection 92A(1)(c) came into effect, Hydro argues, it became so thereafter.

38. While section 92A of the *Constitution Act* has been the subject of scholarly analysis, its effect on the distribution of legislative authority has not yet been considered by the courts. (See J. B. Ballem, "Oil and Gas Under The New Constitution", (1983) 61 Can. Bar Rev. 547; W. D. Moull, "Section 92A of The Constitution Act, 1867", (1983) 61 Can. Bar. Rev. 715; W. D. Moull, "Natural Resources: Provincial Proprietary Rights, The Supreme Court of Canada, and the Resource Amendment To the Constitution", (1983) 21 Alta. L. R. 472; J. P. Meekison, R. J.

Romanow and W. D. Moull, *Origins and Meaning of Section 92A: The 1982 Constitutional Amendment on Resources*, (The Institute for Research on Public Policy, Montreal, 1985); R.D. Cairns, M. A. Chandler and W. D. Moull, "The Resource Amendment (Section 92A) and The Political Economy of Canadian Federalism", (1985) 23 Osgoode Hall L. R. 253.)

39. Subsections (2) and (4) of section 92A were clearly intended to enlarge provincial powers with respect to taxing and regulating export of natural resources in light of certain decisions of the Supreme Court of Canada, but it is less apparent whether subsection (1) itself effected any substantial change in the pre-existing division of legislative authority. Whether it did or not, however, there is no reason to conclude that the phrase "may exclusively make laws in relation to ..." in section 92A(1) has a meaning or effect which is different from the meaning and effect of the same phrase in the opening words of section 92. Both must be read together with section 91 which, as we noted earlier, gives Parliament exclusive jurisdiction over matters coming within the classes of subjects it expressly enumerates, "notwithstanding anything in this Act." The words just quoted embrace section 92A as readily as section 92. It appears to us that subsection 92A(1) of the *Constitution Act* stands in the same relation to section 91 as any of the classes of subjects enumerated in section 92.

40. Counsel for the OHEU submitted that the declaratory power operates only as an exception to the jurisdictional assignment made by the opening words of section 92(10), and cannot be used by Parliament to take jurisdiction over something over which exclusive jurisdiction is assigned to provinces by some other class of subject enumerated in section 92 or by any other section of the *Constitution Act*. As Ontario Hydro is something to which section 92A(1) applies, he argued, a declaration under section 92(10)(c) cannot extend to it. We observe that if other enumerated classes of subjects affect section 92(10)(c) in that way, the declaratory power would not just be circumscribed; section 92(16) ("Generally all matters of a merely local or private Nature in the Province") would totally neutralize it. While a more cautious elaboration of an argument of this sort might avoid that absurdity, it could not avoid the language of section 91(29) and the effect given to that language by the decisions referred to in paragraph 23 above.

41. Although those who crafted section 92A may be taken to have been aware of the declaration in section 17 of the *Atomic Energy Control Act* and of the use of atomic energy to generate electricity in the Provinces of Ontario, Quebec and New Brunswick, we see no reason to conclude that subsection 92A(1)(c) of the *Constitution Act* indirectly repealed or neutralized that declaration in relation to nuclear generating stations or was thought or expected to do so (nor, for that matter, that subsection 92A(1)(b) did so or was thought or expected to do so in relation to uranium mines). Counsel for Hydro invited us to consider the process by which section 92A came to be added to the constitution. The only information we have before us about that process is that found in the writings referred to earlier in paragraph 38. None of those writings supports the view that section 92A was understood or expected to have any direct effect on the scope of the federal declaratory power. Indeed, Messrs. Meekison and Romanow (whose western provincial perspective would, presumably, have inclined them to a different view if they thought it tenable) record that, in the federal-provincial conferences which led to adoption of the language now in section 92A, the western provinces expressly sought limits on the federal government's declaratory power in relation to natural resources, but ultimately failed to achieve that objective. If it is appropriate to consider that sort of material in interpreting section 92A, the material we have referred to (which the parties were given the opportunity to supplement) does not support the view urged by counsel for Hydro and OHEU.

42. Paraphrasing Mr. Justice Duff (in *Gold Seal Ltd., v. Dominion Express Co. and A.-G. Alta* (1921), 62 S.C.R. 424), the fallacy in arguing that section 92A(1)(c) precludes application to



Hydro of the declaration in section 17 of the *Atomic Energy Control Act* lies in failing to distinguish between legislation “affecting” management of electrical power generation facilities and legislation “in relation to” management of electrical power generation facilities. The classes of subjects by which federal and provincial legislative authority is defined in the *Constitution Act* are not water-tight mutually exclusive categories. A matter may fall within both a federal class and a provincial class. For example, federal “insider trading” legislation may be *intra vires* as falling within the recognized power of Parliament to legislate with respect to federally incorporated companies, while “insider trading” provisions of provincial securities legislation of general application will also be *intra vires*, even in its application to federally incorporated companies, as legislation in relation to property and civil rights: *Multiple Access Ltd. v. McCutcheon et al.* (1982), 138 D.L.R. (3d) 1 (S.C.C.). Legislative responses to use of narcotics can also have both federal and provincial aspects: *Schneider v. The Queen* (1982), 139 D.L.R. (3d) 417. Federal legislation is not invalid merely because the matters addressed by it are or might have been addressed from another aspect by valid provincial legislation.

43. Even if, contrary to the court’s conclusion in the *Pronto* case, there would be no federal aspect to legislation in relation to the production and use of atomic energy and prescribed substances without the declaration in section 17 of the *Atomic Energy Control Act*, that declaration itself gives the legislation its federal aspect. The *Canada Labour Code* is valid as federal legislation in relation to those works and undertakings which themselves fall within federal legislative jurisdiction, even though it affects “property and civil rights”, one of the classes of subjects in relation to which the provinces have “exclusive” jurisdiction: the *Stevedoring* case. The fact that such legislation may now be said to affect the management of electrical power generation facilities as well as property and civil rights makes it no less valid, so long as it remains in pith and substance legislation in relation to (in this case) works declared to be for the general advantage of Canada.

44. Starting from the premise that the *Atomic Energy Control Act* is in pith and substance legislation in relation to radiation safety and the control of possible use of atomic energy in weapons, Hydro argued that because that Act does not conflict with the *Power Corporation Act*, the “double aspect” doctrine discussed in *Multiple Access Ltd. v. McCutcheon et al.*, *supra*, and *Schneider v. The Queen*, *supra*, should result in Hydro’s labour relations remaining in provincial jurisdiction. That argument ignores both the decision in the *Pronto* case and the declaration in section 17 of *Atomic Energy Control Act*. Whether or not the court’s analysis in *Pronto* of the peace, order and good government power was correct, the declaration cannot be ignored. It is not for us to say whether Parliament could have accomplished its regulatory objectives with respect to atomic energy matters without resort to use of the declaratory power. The fact is that Parliament did use that power. The labour relations consequence of its having done so seems clear from the decisions to which we have referred.

### Significance of Ontario Hydro’s Being a Crown Corporation

45. Two of Hydro’s arguments rely on the fact that it is owned by the Crown in right of Ontario. One of these was that the declaration in section 17 of the *Atomic Energy Control Act* amounts to an expropriation of property of a province, which it says is contrary to section 117 of the *Constitution Act*. The simple answer to this argument is that while the declaration might be described as an expropriation of legislative jurisdiction (as could any exercise of the declaratory power), it is not an expropriation of property. Section 117 addresses property rights, not legislative authority. It is part of a series of sections which apportioned the then assets and liabilities of the original provinces between them and Canada at the time of confederation. Even if that section speaks about property acquired by a province since confederation, neither it nor the fact of provincial ownership exclude the operation of federal legislation made in the exercise of the authority

conferred by section 91: *Attorney- General of British Columbia v. Board of Transport of Canada*, [1924] A.C. 222; *The Queen v. Board of Transport Commissioners*, [1968] S.C.R. 118. Indeed, the court observed in *Reference Re Waters and Water Powers*, *supra*, at page 219 that:

[T]he proprietary rights of the provinces may be prejudicially affected, even to the point of rendering them economically valueless, through the exercise by the Dominion of its exclusive and plenary powers of legislation under the enumerated heads of section 91.

46. Hydro's other Crown corporation argument is that the *Canada Labour Code* does not apply if the employer is an provincial Crown corporation. It argues that subsection 109(1) of the Code speaks about "federal crown corporations" and that, by doing so expressly, Parliament impliedly excluded provincial Crown corporations. One clear error in this argument is in the breadth of application it assigns to subsection 109(1). That subsection does not apply to all corporations owned by the federal Crown, but only to those which function as Crown agents: *Canada Labour Relations Board et al. v. Canadian National Railway Co.* (1974), 45 D.L.R. (3d) 1 (S.C.C.). If the express reference in subsection 109(1) to such corporations implies exclusion of their provincial analogues (an argument which is not entirely compelling in any event), the excluded category would consist only of corporate agents of the provincial Crown. As we have already noted, Hydro does not claim to be a crown agent. If it were, the *Labour Relations Act* would not apply to it, by reason of section 11 of the *Interpretation Act*, R.S.O. 1980, c. 219.

## Conclusion

47. It is unnecessary to determine whether, as counsel for Hydro and OHEU argued, the Ontario *Labour Relations Act* would apply to Hydro's labour relations with those it employs on works described in section 17 of the *Atomic Energy Control Act* if no applicable federal legislation had occupied the field. It is also unnecessary to assess whether the declaration in that section precludes the application to works described in it of the other provincial legislation to which reference was made in argument. Indeed, it is unnecessary to consider whether and to what extent there is room for concurrent application of provincial legislation in relation to management of electrical power generation facilities in so far as such legislation may incidentally affect the relationship between Hydro and those it employs on or in connection with works referred to section 17 of the *Atomic Energy Control Act*. The essential question here is whether the labour relations regulation provisions of the *Canada Labour Code* in general, and the certification provisions in particular, preclude application to those employees of the equivalent provisions of the Ontario *Labour Relations Act*. It appears to us that they do.

48. We have found that section 17 of the *Atomic Energy Control Act* is valid federal legislation. Having regard to section 92(10)(c) and 91(29) of the *Constitution Act*, the declaration in that section has the effect of bringing within exclusive federal legislative jurisdiction all "works" which fit the descriptions in clauses (a), (b) and (c) of that section. We are inclined to think that the addition to "works" of the words "and undertakings" in the opening words of the section could not extend the effective scope of the declaration beyond "works" as a matter of constitutional law. Indeed, it may not as a matter of interpretation, since the section contemplates that both the "works" and the "undertakings" to which it refers are "constructed" or "to be constructed." It is not absolutely necessary to decide at this point whether the breadth of application of the declaration is effectively enlarged by the words "and undertakings", however, because the answer to the general question at hand is the same in either event. We have assumed at this stage that the words "and undertakings" add nothing to "works."

49. We have concluded that exclusive federal legislative jurisdiction with respect to works which are the subject of the declaration in section 17 of the *Atomic Energy Control Act* includes

jurisdiction to legislate with respect to the labour relations of those employed on or in connection with such works. The phrase “on or in connection with” in this context is intended to reflect the tests by which the courts have ascertained whether a sufficient functional relationship exists between the core federal undertaking and the activities in which any particular employees in question are engaged, so as to bring labour relations with respect to those employees within federal jurisdiction: see, for example, *Northern Telecom #1*, *supra*, *Northern Telecom #2*, *supra*, *Canada Labour Relations Board et al. v. Paul L’Anglais Inc. et al.* (1983), 146 D.L.R. (3d) 202 (S.C.C.) and *Construction Montcalm v. The Minimum Wage Commission et al.*, [1979] 1 S.C.R. 754. This federal jurisdiction over the labour relations of individuals employed on or in connection with these declared works is not excluded by the fact that the declared works form part of “facilities in the province for the generation and production of electrical energy” within the meaning of subsection 92A(1) of the *Constitution Act*, nor by the fact that Ontario Hydro is owned by (but does not claim to be acting as agent of) the provincial Crown.

50. Again, the question we have addressed at this stage is whether there is a category of employee of Ontario Hydro, definable by reference to section 17 of the *Atomic Energy Control Act*, whom we would have no jurisdiction to include in a bargaining unit in this application because Ontario Hydro’s labour relations with them is a matter which falls within federal jurisdiction. The answer to this constitutional question does not turn on whether those employed on or in connection with works described in that section constitute a unit appropriate for collective bargaining, nor on an assessment of the relative efficiency as between assignment of the labour relations in question to the federal or the provincial jurisdiction: *Northern Telecom #2*, *supra*, as Estey J. at p. 760. One of the consequences of divided legislative jurisdiction over labour relations is that an employer may find that some of its employees fall within federal jurisdiction for labour relations purposes while others fall within provincial jurisdiction.

51. It is apparent from the evidence that there are some persons who might otherwise fall within the unit affected by this application whose regular duties include the operation or supervision of the operation of CANDU reactors. Those persons, at least, fall within federal jurisdiction for labour relations purposes. Thus, there is a category of employee of Ontario Hydro whom we would have no jurisdiction to include in any bargaining unit in this application, namely: all those employed on or in connection with works which by section 17 of the *Atomic Energy Control Act* have been declared to be works for the general advantage of Canada.

52. As we indicated earlier, those then participating in the hearings on this constitutional issue agreed at the outset that we would first resolve only the general question repeated and answered in the preceding paragraph, without attempting to identify with particularity all of the persons who would be excluded from the reach of this application if we came to the conclusion at which we have now arrived. Even though we have heard some evidence relevant to the identification of those persons, it would not be appropriate for us to formulate or articulate in any more detail the tests by which they would be identified, without first affording the participants a further opportunity to lead evidence and make argument addressed specifically to those matters. We should not, however, be taken as having yet concluded that anyone employed at or in connection with the Darlington construction site or the Research Division can be described as employed on or in connection with a work or works of the sort contemplated by section 17 of the *Atomic Energy Control Act*. The timing and necessity of our considering those matters and any other matters arising out of our decision on the general question can be addressed when our ongoing hearings on the “status questions” resume in March.

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**2292-86-U Delphis W. Vandette, Complainant v. The Corporation of the Township of St. Joseph and Labourer's International Union of North America Local 1036, Respondents**

**Interference in Trade Unions - Parties - Unfair Labour Practice - Complainant an unsuccessful applicant for a job as an equipment operator - Discussions with job applicants alleged to breach prohibition in Act against individual bargaining - No breach of Act - Employee not having status to allege violations of sections 50 and 67**

**BEFORE:** *Ken Petryshen*, Vice-Chair, and Board Members *G. O. Shamanski* and *H. Peacock*.

**APPEARANCES:** *Orlando Rosa* for the complainant; *L. Steinberg* and *Jimmie Lewis* for Labourer's International Union of North America, and *Gladys Pardu* for The Corporation of the Township of St. Joseph.

**DECISION OF THE BOARD;** February 17, 1988

1. This is a complaint under section 89 of the *Labour Relations Act* in which it is alleged that the Corporation of the Township of St. Joseph ("the Township") contravened sections 50 and 67 of the Act and that the Labourer's International Union of North America, Local 1036 ("Local 1036") contravened section 68 of the Act.
2. The Board began the proceedings by inquiring into the complaint insofar as it alleged contraventions of sections 50 and 67 of the Act against the Township. At the Board's request, counsel for the complainant set out the facts upon which the complainant intended to rely in support of the allegations made against the Township. Counsel for the complainant then made submissions to the effect that the facts relied upon should cause the Board to find a violation of sections 50 and 67 of the Act. After entertaining counsel for the complainant's submissions, the Board recessed to consider the matter. When the hearing recommenced, the Board orally ruled at the hearing that it dismissed the complaint against the Township with respect to the sections 50 and 67 allegations even assuming the facts relied on by counsel were true. Our reasons for this decision are as follows.
3. Mr. D. Vandette was hired by the Township in June 1984 as a temporary part-time labourer in the Township's road department. The Township decided to hire a temporary part-time labourer at that time since one of the road department employees, Mr. Lloyd Aikens, was off work due to an injury and because temporary help might be required for holiday replacement. As a result of the scheduled return of Aikens, the Township advised Vandette that he would be laid off on January 11, 1985. Prior to the lay-off, Vandette worked a considerable number of hours and subsequent to the lay-off, he worked on a sporadic basis.
4. In April 1986, the Township sought applicants for the position of equipment operator which became vacant upon the resignation of Aikens. Vandette was one of a number of applicants who applied for the job but he was not the successful applicant. The Township selected Harold Brown to fill the position. In essence, it is the Township's decision to hire Brown as an equipment operator instead of Vandette which the complainant argues constitutes a violation of the relevant collective agreement and, therefore, section 50 of the Act. In support of the contention that the Township contravened section 67 of the Act, the complainant relies on the fact that representatives of the Township had discussions with the applicants for the vacant position which involved the

nature of the job and their qualifications. In counsel for the complainant's submission, these discussions contravene section 67's prohibition against individual bargaining.

5. Sections 50 and 67 read as follows:

50. A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement.

67.-(1) No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

(2) No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall, so long as another trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with an employer or an employers' organization on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

6. Although not automatic, the general policy of the Board is to defer to the arbitration process where the matter complained of involves an alleged contravention of both the collective agreement and the Act. With respect specifically to an alleged violation of section 50 of the Act, the Board will not entertain such a complaint unless what is alleged amounts to a total repudiation of the collective agreement (see *Maple Leaf Taxi Company Ltd.*, [1982] OLRB Rep. Nov. 1671) or in some other way amounts to a failure to recognize a bargaining agent. Since the alleged breach of section 50 is based on a single incident involving the failure of the Township to award the complainant the equipment operator position, the Board was satisfied that these were circumstances which would not cause it to entertain the complaint insofar as it alleged a breach of section 50 of the Act.

7. In our consideration of the submission relating to the alleged contravention of section 67 of the Act, the Board was satisfied that the facts relied upon did not establish a contravention of the Act. Sub-section 67(1) of the Act is a provision which prohibits an employer from interfering with the bargaining rights of a trade union that is entitled to represent its employees. The discussions between Township representatives and the applicants for the equipment operator position were not unusual and did not amount to interference with the bargaining rights of Local 1036.

8. Although it is unnecessary to decide the issue, we do not wish the manner in which we have disposed of the complaint as against the Township to imply that individuals have status to make complaints alleging contraventions of sections 50 and 67 of the Act. The Board previously has found that employees do not have status to bring a complaint alleging breaches of sections 15 or 79 of the Act (see *Canadian General Electric*, [1980] OLRB Rep. Aug. 1179 and *Blue Line Taxi Ltd.*, [1987] OLRB Rep. Apr. 470). It appears to us that the analysis utilized in these cases is applicable to employee complaints alleging violations of sections 50 and 67 of the Act.

9. Once the panel disposed of the allegations in the complaint against the Township, the Vice-Chair proceeded to hear the section 68 aspect of the complaint alone.

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**2262-87-R; 2288-87-R** The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, Applicant v. 542590 Ontario Ltd. c.o.b. as **Travelers Motor Inn**, Respondent; Labourers' International Union of North America, Local 1081, Applicant v. 542590 Ontario Ltd. c.o.b. as Travelers Motor Inn, Respondent

**Certification - Construction Industry - Employer - Respondent hotel entering into arrangement with masonry apprentice to construct exterior masonry walls of an extension on the hotel - Respondent hotel found to be the employer rather than the contractor - Respondent hotel operating a business in the construction industry - Whether apprentice and others independent contractors to be determined at a later hearing**

**BEFORE:** *N. B. Satterfield*, Vice-Chair, and Board Members *J. Trim* and *J. Redshaw*.

**APPEARANCES:** *David Strang* and *Keith Rimmington* for Labourers' International Union of North America, Local 1081; *Thomas Oldham* and *Danny DeMonte* for the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen; *T. J. Billo* and *Zisi Konstantinou* for the respondent.

**DECISION OF N. B. SATTERFIELD, VICE-CHAIR, AND BOARD MEMBER J. REDSHAW;**  
February 24, 1988

1. The name of the respondent in these applications is amended to read: "542590 Ontario Ltd. c.o.b. as Travelers Motor Inn". The name of the applicant in File No. 2288-87-R has been amended to read: "Labourers' International Union of North America, Local 1081".
2. These are two applications for certification made under the construction industry provisions of the *Labour Relations Act*.
3. The reply to each application claims that the persons whom the applicants are seeking to represent are not employees of the respondent, rather they are employees of Mark Warren Masonry. When the applications came before the Board for hearing, respondent counsel raised two further issues. First, should the Board find that the respondent was the employer of the persons in question, the respondent was not a person who operates a business in the construction industry and, therefore, is not an employer within the meaning of clause (c) of section 117 of the Act. Second, and in the alternative, if the Board finds that the respondent is a person who operates a business in the construction industry, the persons whom the applicants are seeking to represent are independent contractors and, therefore, not employees within the meaning of the Act. The respondent had not served on the Board or the applicants any notice of intent to raise the issues at the hearing. The Board, however, ruled that the first of the two issues raises a question which the Board must answer in every application for certification stated to be brought under the construction industry provisions of the Act before it can apply section 119 of the Act to the application. If the Board finds that the respondent is not a person who operates a business in the construction industry, the application will not be processed under the construction industry provisions of the Act. With respect to the second issue, the Board reserved its ruling after receiving the submissions of the parties on whether it should entertain the issue in the hearing. By the time the Board had received the evidence and representations of the parties on the other two issues, it was necessary to adjourn the hearing without rendering a decision on the issues. Accordingly, the Board set April 8, 1988, for continuation of hearing into the two applications. In these circumstances and in the event that the Board's decision on the two threshold issues does not dispose of the applications, the



Board ruled that it would entertain the independent contractor issue at that time, since there was no longer any prejudice to the applicants from lack of notice about the issue.

4. The Board's findings of fact on the issues of whether the respondent or Mark Warren Masonry is the employer of the persons affected by this application and whether the respondent is a person who operates a business in the construction industry are based on the testimony of Zisi Konstantinou for the respondent and Thomas Oldham and Mark Warren for the applicants. There were no major conflicts in the evidence, but, having assessed the credibility of the witnesses according to the commonly applied criteria and having regard to what is reasonably probable in all of the circumstances, where there is conflict in the evidence of Konstantinou and Warren, the Board prefers Warren's evidence.

5. Konstantinou is secretary-treasurer of the respondent and, together with his parents, operates the respondent's business. The respondent owns and operates a 20-unit motel in Cambridge. At the time these applications were made, the respondent did not own or operate any other motels. Konstantinou and his parents decided to extend the motel by adding a second floor of 20 units, and engaged an architect towards this purpose. The architect designed the extension, prepared drawings for it, obtained for the respondent all of the permits necessary in order to build the extension, obtained bids from electrical and mechanical contractors for the electrical and mechanical components of the extension, and inspected finished work, including the masonry work at issue. The respondent sought bids also from three masonry contractors, but had difficulty initially finding ones who were prepared to start the work at a time satisfactory to the respondent and who would submit bids for the masonry work. This circumstance led the respondent ultimately to enter into an arrangement with Mark Warren to construct the exterior masonry walls of the extension. The precise nature of that arrangement is the focal point of the issues before the Board.

6. The reply states that Mark Warren Masonry is the employer. There is no evidence before the Board from which it reasonably could conclude that there is a business of that name. Mark Warren is a second year apprentice with a masonry contractor who operates in the Cambridge area and whose employees are said to be represented by the applicants. Mark Warren's brother Lloyd was working for the respondent at the time the decision was made to proceed with the extension of the motel. He suggested to his brother and to Konstantinou that the two of them discuss the possibility of Mark Warren doing the masonry work. To that end, Mark Warren reviewed the drawings with Konstantinou and with Roman Jakowski and learned that Konstantinou wanted the exterior walls erected before winter so that the extension could be roofed, thus allowing the interior work to be completed during the winter. Konstantinou described Jakowski as a carpentry contractor who had done some renovation work for the respondent and had been engaged for carpentry work on the extension project. He also helped Konstantinou review bids submitted by trade contractors for the motel extension.

7. After Warren had reviewed the drawings with Konstantinou and Jakowski, he was of the view that a masonry crew could complete the exterior walls on a Saturday and Sunday. He took a set of the drawings and reviewed them with his own foreman and estimated the kind of crew and equipment that would be needed to do the job in two days. Next he spoke with persons whom he thought would make up a suitable crew, apparently all employees of his own employer, and identified the rates for which they would be willing to work. Based on the information which he gathered, Warren determined that the job could be done in two days, a Saturday and Sunday, at an estimated cost of \$4,950.00 for labour, equipment and disposable supplies. His estimate broke out the total cost into \$2,800.00 for labour, \$1,750.00 for equipment and \$400.00 for supplies. He had obtained a quotation on equipment costs from a rental company which he and Konstantinou called "Reitzels". Warren presented his estimate to Konstantinou, whereupon Konstantinou asked him

for details about the kind of equipment needed, the number of persons on the crew and the hourly rates at which they would be paid. Konstantinou recorded this information on the estimate sheet which Warren had given to him.

8. Konstantinou eventually arranged with Warren to have the exterior walls built on the basis which Warren had proposed; in other words, it would be completed by a crew working on a Saturday and a Sunday at the hourly rates which Warren had used to estimate the labour cost. The respondent was to supply all materials at its cost and pay for the rented equipment. The rental from Reitzels required a deposit on delivery of the equipment. The respondent issued a certified cheque for \$2,000.00 as a deposit and was later invoiced for and paid the actual cost of the rental. Konstantinou decided on his own not to rent a forklift truck from Reitzels and made his own arrangements to get one from another source. Warren told Konstantinou that each person on the masonry crew was to be paid at the end of the day on Sunday for work done on Saturday and Sunday. Payment was to be made by the respondent to each person in Warren's presence and was to be in cash without any deductions. They were to be paid at the rates of pay and hours reported by Warren to Konstantinou. According to Konstantinou the reason why the respondent supplied all of the materials, paid for the rental of equipment and agreed to pay each person in cash was because Warren had no line of credit of his own. By the time Konstantinou advised Warren that he wanted him to do the work according to that arrangement, the respondent had received the bids from two other masonry contractors. Warren presumes that the respondent proceeded with this arrangement because the work could be done immediately and at a lower cost than was available from the contractors who eventually bid the work.

9. Warren began laying out the job on Friday evening, November 6th and completed the layout on Saturday with the assistance of Brian Hutt, the foreman for his regular employer. Warren arranged for the crew which he had selected to begin work on Saturday at the rates which he had arranged with each one of them and on the basis of the above payment. Work began as planned on Saturday and some work was done on Sunday, but weather and a breakdown of the forklift truck limited the amount of work with the result that the exterior walls were not completed in the two days. The employees were paid for the work performed on the Saturday and Sunday, or either day, at the hourly rates and for the hours of work as reported to the respondent by Warren. With certain exceptions, they were paid by the respondent issuing cheques made out personally to them and then cashing the cheques immediately. The exceptions involved the respondent's payment to Mark Warren. It included, in addition to payment for the hours which Warren worked, reimbursement for the wages which Warren had paid to Brian Hutt on Saturday because Hutt was not going to work on Sunday, and a small amount for payment to another person to correct an error in pay. The rest of Warren's own payment was for the hours which he worked at the same rate (\$16.00 per hour) which was paid to other second year apprentices on the crew. Warren also had a dispute with Konstantinou's father about the calculation of the payment for each person. Konstantinou's father unilaterally deducted a half hour from the hours reported by Warren for a meal break on each of the two days. Warren had not included the meal times in the hours he had reported. It is not clear from the evidence whether the error was corrected. Warren decided, as a result of the dispute, that he would not be responsible any more for reporting the hours worked by the masonry crew. He told Jakowski of his decision and, further, told him that he, Jakowski, could report the time to the respondent.

10. Since the work was not completed on the Sunday, Mark Warren and another bricklayer, Mike Surik, came to work on Monday, along with Warren's brother Lloyd and a fourth person, Michael Wilbur. It is reasonable to infer from the evidence before the Board that Lloyd Warren and Michael Wilbur performed the work of masonry tenders to the bricklayers. In the masonry trade, that work is customarily performed by construction labourers. Representatives of the appli-



cants became aware of the work which the four persons were doing on Monday, came to the job and arranged to meet with them off site at lunch time. These applications for certification were made that same day as a result of those meetings. At the end of the day, because of his dispute with Konstantinou's father on Sunday, Warren did not report to the respondent the actual hours which he and the three other persons had worked. The respondent decided to pay them for four hours work which, for Mark Warren was 3 1/2 hours less than he actually worked. It was his evidence that the other three persons were not paid for the actual hours which they worked either.

11. The respondent had no say in whom Mark Warren chose to work on the masonry crew on Saturday, Sunday or Monday, how much work they were to do or the hours which they were to work. Warren had sole control over how the work was to be done. He removed one person from the crew on Saturday because of unacceptable work and he did so without checking with anyone.

12. Neither the respondent nor Warren made any statutory remittances for income tax, unemployment insurance or contributions to the Canada Pension Plan for the persons who worked on any of Saturday, Sunday or Monday. Nor did the respondent or Warren pay any assessment for Workers' Compensation. Konstantinou had Warren and each of the persons on the crew sign, in common, a statement which Konstantinou called a "disclaimer" that the respondent would not be responsible for an injury occurring to any one of them while working on the motel site. He thought this might protect the respondent from liability in the event of injury on the job.

13. The persons who are affected by this application are Mike Surik, Lloyd Warren, Michael Wilbur and, should the Board find that the respondent is their employer, Mark Warren. They are the persons who were at work on November 9, 1987, the date of making of this application. For ease of discussion, the Board will assume for the time being that Surik, Lloyd Warren and Wilbur are not independent contractors. The Board's task at this stage of the proceedings is to decide whether the respondent is their employer for purposes of the *Labour Relations Act*. Should the Board find that the respondent is not their employer, these applications would be dismissed. On the other hand, should the Board find the respondent to be their employer, the Board will assume Mark Warren to be an employee of the respondent also. It would become necessary, at that point, for the Board to determine whether the respondent is an employer within the meaning of clause (c) of section 117 of the Act; that is, a person who operates a business in the construction industry.

14. The parties made full submissions to the Board on both issues. The Board, in reaching the conclusions set out hereunder, has considered their submissions and the cases cited therein, but finds it unnecessary to either detail or summarize their arguments for purposes of this decision. It is sufficient to say that, with respect to the question of whether the respondent is the employer of the persons affected by these applications, respondent counsel argued that Warren exercised control over the persons performing the masonry work, the means of construction, the equipment used, the time of employment and such working conditions as when the work was to begin and end, who was to be hired or fired and what work each person would do. Counsel also asked the Board to apply the same criteria which it has used in the past when deciding whether an entity is an employer, particularly the fourfold test. The Board understands counsel to mean the test referred to by Lord Wright in *Montreal v. Montreal Locomotive Works Limited*, [1947] 1 D.L.R. 161 (P.C.) at page 169. Applicant counsel, on the other hand, relied primarily on the seven criteria identified in the Board's decision in *York Condominium Corporation*, [1977] OLRB Rep. Oct. 645, adopted and more widely canvassed by the Board in *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538. The *York Condominium* criteria have been used by the Board to help it focus on the realities of an arrangement which is alleged to be or not to be an employment relationship, rather than on the



appearance or purpose of the arrangement. In the peculiar circumstances of the instant case, the Board finds it unnecessary to rely on those criteria for that purpose.

15. The facts of this case clearly cast the respondent in the role of general contractor for the building of the motel extension. The respondent negotiated a price with Roman Jakowski for the carpentry work, invited bids for the electrical, masonry and mechanical work, evaluated the bids with Jakowski's assistance, selected the parties who were to do the work and entered into arrangements with them for the performance of the work. In the case of the masonry work, the arrangement was with or through Warren. The question for the Board is whether that arrangement was a contract for the supply of labour, equipment and disposable supplies, as the respondent contends, or an arrangement to employ Warren and the others to perform the masonry work.

16. Respondent counsel does not claim that there is a contract in writing between the respondent and Warren. Rather, as the Board understands counsel's argument, he contends that the written estimates which Warren supplied to Konstantinou together with Warren's actions in undertaking and performing the work, constitute an implied contract between the respondent and Warren for Warren to construct the exterior walls of the motel extension for the total cost of the estimate which he had presented to Konstantinou and which was accepted by him without question. According to respondent counsel, the fact that the respondent chose to protect itself by paying for the work as it progressed, does not alter the contract price. It was merely a move by the respondent to protect itself against Warren walking away from the job.

17. If the arrangement between the respondent and Warren was a contract for the supply of labour, equipment and supplies as contended by respondent counsel, the respondent immediately began to breach the contract. First, Konstantinou unilaterally decided to arrange rental of a forklift truck from a source other than Reitzels. Second, Konstantinou's father reduced the hours reported by Warren without consulting with him when the father calculated payments for the work done on Saturday and Sunday by the members of the masonry crew. It is not clear on the evidence whether the payments were eventually corrected, but even if they were, it does not alter the fact that the respondent acted unilaterally to reduce the hours reported by Warren. The respondent acted unilaterally again to decide how many hours Warren, Lloyd Warren, Surik and Wilbur were to be paid for work which they performed on Monday, November 9th. Respondent counsel argues that the second and third instances are merely the actions of an owner making sure he does not pay for services not rendered. That is one way to characterize the respondent's action, but one would expect it to bring the dispute to the contractor's attention instead of arbitrarily adjusting payment. In the Board's view, those two actions and Konstantinou's action to make independent arrangements for the forklift truck are characteristic of the respondent seeing itself as not being under a contractual arrangement with Warren for the supply of labour and equipment, and are more like the actions of a party seeing itself as having control over the work in question and exercising it.

18. The facts leave no doubt that Warren assembled the masonry crew which worked Saturday, Sunday and Monday. The respondent did not participate in any way and, in fact, depended on Warren to put the crew together. Warren also worked out with each person what hourly rate was to be paid, told him when and where they were going to work and the respondent depended on him to do so. Warren decided whether the finished work was acceptable and, at least in one instance, took action when it was unacceptable to him without seeking authorization from anyone, including the respondent. The question is, was he doing it in his own right for his potential benefit or detriment, or was he doing it for the respondent.

19. While the facts cloak Warren with the appearance of having fundamental control over significant aspects of the working environment of the masonry crew, there is no evidence that he

held himself out in any way to those persons or to the respondent as their employer. Nor is there any evidence that Warren has held himself out to the respondent as an independent contractor capable of employing others. Furthermore, there is no evidence of him having any attributes of an independent contractor capable of employing others. He has no line of credit with any financial institution or any other visible financial means for meeting a payroll on his own behalf, not even to the point of the respondent putting him in funds as work progressed so that Warren could pay the crew. Nor did he have the credit or other financial means to rent equipment and pay for disposable supplies. The only responsibility Warren took for payment of wages was to report, for Saturday and Sunday, the rates of pay and the hours worked, witness the payment to the individuals by the respondent and intercede when they were not paid for the hours which he reported. On Monday, the critical date, he took no responsibility for what the respondent paid to Surik, Lloyd Warren and Wilbur. While the respondent was dependent on Warren's knowledge of the masonry trade for construction of the exterior walls of the motel extension, there is no evidence that Warren would have been responsible for correcting at his cost any work rejected by the respondent's architect, a responsibility that usually runs with an independent contractor relationship.

20. It is clear that the respondent has control of the overall motel extension project. In that context, the fact that the respondent, through Konstantinou and his father, unilaterally decided to change the source and cost of the forklift truck rental, reduced the hours of work reported by Warren for Saturday and Sunday, and decided how many hours were to be paid for Monday, points in the direction of the respondent having real control over the supply of equipment and labour for the masonry part of the project. Its reduction of the hours (and therefore the amount of pay), even if corrected later, is analogous to an employer disciplining its employees. These circumstances and the facts as a whole lead the Board to conclude that Warren was nothing more than the respondent's agent. He acted for the respondent to find enough persons who were prepared to work at predetermined rates of pay and who had the skills necessary to construct the exterior walls of the motel extension during a two-day weekend. Warren acted as the respondent's agent in two other respects: to identify the equipment needed for the work to be done, the source from which it could be rented and the cost of renting it; and to lay out the work, assign it to the members of the crew and accept or reject the completed work. As the respondent's agent, Warren stands in the respondent's shoes and that is all that distinguishes him from the other members of the crew since, otherwise, he performed the work of his bricklayer trade and was paid for that work at the same rate as two other second year apprentices.

21. Therefore, having regard to all of the foregoing, if Surik, Lloyd Warren and Wilbur are found to be employees and not independent contractors, the Board would find the respondent to be their employer and, as well, to be the employer of Mark Warren. That takes the Board to the second issue of whether the respondent would be an employer for purposes of the construction industry provisions of the Act. Clause (c) of section 117 of the Act states:

117. In this section and in sections 118 to 136,

(c) "employer" means a person who operates a business in the construction industry, and for purposes of an application for accreditation means an employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof.

Construction industry is defined in clause (f) of subsection (1) of section 1 of the Act which states:

1.-(1) In this Act,

(f) "construction industry" means the businesses that are engaged in constructing,

altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof.

22. It can be seen from those two clauses that, in order for the Board to find the respondent to be an employer within the meaning of clause (c) of section 117, the respondent must be found to operate a business and that business must be engaged in the activities described in clause (c) of subsection (1) of section 1 of the Act. There is no dispute that the work being performed by the subject employees on November 7, 1987, was the kind of work referred to in the latter clause. Nor is there any dispute that the respondent is a person who operates a business. The issue is whether the respondent operates a business which is engaged in the kind of work which those employees were performing. In the Board's view, when, as here, the business includes the employment of employees to build an extension on the respondent's motel, being work which the Board has found is included within the definition of construction industry in clause (f) of subsection (1) of section 1 of the Act, the business is engaged in the construction industry. Accordingly, the Board finds that the respondent was a business engaged in constructing and altering buildings within the meaning of that clause at the times material to this application.

23. It follows, therefore, that the respondent was operating a business in the construction industry and is an employer within the meaning of clause (c) of section 117 of the Act. Respondent counsel argues that the respondent's construction of the motel extension is a "corollary" of the business of operating the motel and that the phrase "operates a business" as used in clause (c) of section 117 of the Act has to mean more than just a one time only project. It is not clear on the evidence whether, in fact, this is the respondent's first venture into the construction industry as an employer, but it is only speculation to suggest it will be its last. Even if the motel extension is the respondent's first venture as an employer in the construction industry and it does not expect to carry on another one in future, these circumstances are no reason for the Board not to hold that the respondent is operating a business in the construction industry respecting its motel extension project. See *Group Thirty Three Limited*, [1974] OLRB Rep. Dec. 888, at paragraph 29, and the Board decisions referred to therein. With respect to whether the phrase "operates a business" in clause (c) of section 117 of the Act can accommodate the fact that construction of the motel extension, to use respondent counsel's term, is a "corollary" of the business of operating the motel, a similar argument was raised with the Board in its decision in *Abitibi-Price Inc.*, [1986] OLRB Rep. Dec. 1613. The argument was made that the Board had failed in all of its prior decisions to give full meaning to the words "...operates a business in the construction industry...". The argument caused the Board to review the meaning which it had given to that phrase in a wide variety of factual circumstances since it was first interpreted by the Board in *Tops Marina Motor Hotel*, [1964] OLRB Rep. Jan. 583. The Board's discussion is found at paragraphs 40, 41 and 42 of its decision in *Abitibi-Price Inc.*, *supra*. The decision notes with approval the broad meaning given to the word "business", a breadth which has accommodated situations, for example, where the work was done for the employer's own purposes, as is the case here; where the employer is carrying out its own alterations and renovations, where there is no profit motive in performing the work; and, where "construction" is not the primary or dominant business of the employer. The Board is satisfied that the broad meaning which has been given consistently to the word "business" accommodates and should be applied to the circumstances of this case.

24. Since the Board has found the respondent to be a person who operates a business in the construction industry and, therefore, is an employer within the meaning of clause (c) of section 117 of the Act, it is necessary for the Board to receive the evidence and representations of the parties respecting whether, on November 9, 1987, Mark Warren, Mike Surik, Lloyd Warren and Mike Wilbur were independent contractors as respondent counsel claims. For that purpose, the hearing into these applications will continue on April 8, 1988, the date set in the hearing on February 5,



1988, in the event that the Board's resolution of the first two issues did not dispose of these applications.

25. These applications are referred to the Registrar to be listed for continuation of hearing on April 8, 1988.

**DECISION OF BOARD MEMBER J. TRIM;**

1. I am unable to concur with my colleagues' decision.
  2. In my opinion the Company never operated a business in the construction industry. This was an arrangement similar to a home owner contracting for an addition to his/her house.
  3. The supervision of the work was never under the owner or its representatives, they merely gave directions as to what they wanted done.
  4. The respondent's involvement in the construction industry was simply to add an extension on their inn. I do not feel that the manner in which they undertook to have this done constitutes operating a business in the construction industry nor are they an employer within the meaning of the *Labour Relations Act*.
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**2930-87-R Glass, Pottery, Plastics & Allied Workers International Union, Applicant v. VS Services Ltd., Respondent**

**Certification - Employer - Pre-Hearing Vote - Dispute concerning the identity of the employer need not be resolved before a pre-hearing vote can be conducted**

**BEFORE:** *Owen V. Gray*, Vice-Chair, and Board Members *G. O. Shamanski* and *B. L. Armstrong*.

**DECISION OF THE BOARD; February 22, 1988**

1. The applicant has requested that the Board conduct a pre-hearing representation vote in connection with this application for certification. The respondent says the Board has no jurisdiction to do so unless and until it determines who is the employer of the persons whom the applicant claims to have organized.
2. The applicant says the respondent is the employer of persons who perform food service work at Hotel Dieu Hospital in Cornwall, Ontario. The respondent says that while it manages the hospital's food service and dietary department pursuant to a management contract, it does not employ the dietary staff in question: they are employees of the hospital.
3. The question for us is not who is right - that can only be determined after a hearing. The question is whether we can conduct a vote among the persons in question before holding that hearing.
4. The object of the pre-hearing vote procedure is to expeditiously record the wishes of those whose wishes may be relevant to the disposition of a certification application, and to do so

before adjudicating any issue in respect of which a hearing may be necessary. This theme has been elaborated on many occasions. This panel's decision in *Ontario Hydro*, [1987] OLRB Rep. Dec. 1589 at paragraphs 2 to 5 is a recent example.

5. The notion that it must resolve the identity of the employer of persons before it can conduct a pre-hearing vote among them was specifically rejected by the Board in *Sayvette Family Department Store Ltd.*, [1974] OLRB Rep. May 327. While it is not clear whether it was all (as here) or just some of the potential voters whose employment relationship with the respondent was at issue in that case, the applicable principles would be the same in either event. The Board is not required to resolve an issue of the sort raised by the respondent before conducting a vote; if it were otherwise, any request under section 9 of the *Labour Relations Act* for a pre-hearing vote could be frustrated by a respondent's bald denial that it employs anyone. While we do not suggest that this respondent raises the issue otherwise than in perfect good faith, the principles applied at this stage must be the same whether the issue is serious or frivolous, since without a hearing no such distinction could be drawn.

6. Without prejudice to its position that it is not the employer of anyone who would fall within such units, the respondent agrees with the applicant that (if it were the employer of such persons) the following constitute units of employees appropriate for collective bargaining:

a) *Bargaining Unit #1*

All employees of the Respondent at Hotel Dieu Hospital, Cornwall, save and except supervisors, persons above the rank of supervisor, clerical and office staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period.

b) *Bargaining Unit #2*

All employees of the Respondent at Hotel Dieu Hospital, Cornwall regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, clerical and office staff

In view of that agreement, we determine that those would constitute the voting constituencies for the purposes of any pre-hearing vote or votes herein.

7. The parties have identified the persons who would have been within those units on the application date, on the applicant's view of the issue as to who employs the dietary workers at the Hotel Dieu Hospital. Of course, the respondent takes the view that there were no such persons on the relevant date. This is merely a rather extreme example of the problem dealt with in *The Board of Education for the City of North York*, [1984] OLRB Rep. July 989, where the parties were in substantial disagreement about the identity of those who were employed in a voting constituency on the relevant date. The Board had to determine how to assess whether there was the "appearance" of membership in sufficient quantity to satisfy the test prescribed in subsection 9(2) of the Act. The Board concluded (at paragraph 7) that:

Where determination of the actual prerequisite level of support depends on a resolution of contested factual or legal issues, the Board assesses the appearance of support on the assumption that the union's position on the matters in dispute is correct. A pre-hearing vote is normally directed if, on that assumption, the requisite appearance of support is present. The contested issues are dealt with after the vote is held. However; the results of a pre-hearing vote are of no effect unless it is later demonstrated that no less than 35 per cent of the persons ultimately found

to have been employees in the appropriate bargaining unit on the application date were members of the applicant on that date. If that demonstration depends on contested issues being later resolved in the applicant's favour, the Board will normally defer counting any ballots until it can resolve those issues which bear on the propriety of counting all, or any, of the ballots.

We adopt those conclusions.

8. The applicant has the requisite appearance of membership support among those who, on the applicant's view, fell within the voting constituency described in sub-paragraph 6(a) above, at the relevant time, but not among those in the voting constituency described in subparagraph 6(b).

9. Accordingly, the Board directs that a vote be conducted among those in the voting constituency described in subparagraph 6(a) above. All those said to have been employed in that voting constituency on February 10, 1988 who are also said to be so employed on the date the vote is taken will be eligible to vote.

10. Voters will be asked whether or not they wish to be represented by the applicant in their employment relations with the respondent. We note the applicant's undertaking not to rely on the form of the ballot in support of an argument that the persons in question regard the respondent as their employer.

11. The ballot box shall be sealed and the ballots not counted unless on agreement of the applicant and respondent or by further order of the Board.

12. The following shall appear in the Board's Notices of Taking of Vote posted in connection with the vote:

PLEASE NOTE: The Ontario Labour Relations Board has not yet decided whether the respondent VS SERVICES LTD. is the employer of anyone who works at Hotel Dieu Hospital in Cornwall, Ontario. That question is currently in dispute. If it remains necessary to do so the Ontario Labour Relations Board will decide that question after this vote is conducted.

13. The matter is referred to the Registrar.

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**2292-86-U Delphis W. Vandette, Complainant v. The Corporation of the Township of St. Joseph and Labourer's International Union of North America Local 1036, Respondents**

**Duty of Fair Representation - Parties - Unfair Labour Practice - Whether complainant an employee in the bargaining unit - Complainant a union member but parties never intended to have such an employee covered by the collective agreement - Board finding complainant not an employee in the unit - Complaint would not be successful even if the complainant did have status to bring it**

**BEFORE:** *Ken Petryshen*, Vice-Chair.

**APPEARANCES:** *Orlando Rosa* for the complainant; *L. Steinberg* and *Jimmie Lewis* for Labour-



er's International Union of North America, and Gladys Pardu for The Corporation of the Township of St. Joseph.

**DECISION OF THE BOARD;** February 17, 1988

1. This is a complaint under section 89 of the *Labour Relations Act* in which it is alleged that the Corporation of the Township of St. Joseph ("the Township") contravened sections 50 and 67 of the Act and that the Labourer's International Union of North America, Local 1036 ("Local 1036") contravened section 68 of the Act. Once a panel dismissed the allegations in the complaint against the Township, the Vice-Chair proceeded to hear the section 68 aspect of the complaint alone. The reasons for dismissing the complaint against the Township relating to the sections 50 and 67 allegations are contained in a separate decision.
2. Local 1036 and the Township took the position that the complainant, at the relevant time, was not an employee in the bargaining unit and, accordingly, Local 1036 did not owe D. Vandette a duty under section 68 of the Act. The parties agreed that the Board deal with this issue first and then with the merits of the section 68 complaint if necessary. After entertaining the evidence and submissions directed to whether or not Vandette was an employee in the bargaining unit at the relevant time, the Board reserved its decision and proceeded to hear the evidence and argument on the merits of the complaint.
3. With respect to the issue of Vandette's status to bring a section 68 complaint, Local 1036 called Jimmie Lewis, the Secretary-Treasurer and Business Manager for the Local, to testify. Allan Rousseau, the road superintendent, and Michael Jagger, the clerk, gave evidence on behalf of the Township. Counsel for the complainant called Mr. Vandette to testify. In making its factual determinations, the Board has weighed and assessed all of the evidence, including the credibility of the witnesses. In essence, there was little dispute on the facts relevant to the preliminary issue.
4. Vandette's employment with the Township began in June 1984 when he was hired as a temporary part-time labourer in the Township's road department. The Township required a temporary part-time labourer at that time since one of the road department employees, Mr. Lloyd Aikens, was off work due to an injury and because temporary help might be required for holiday replacement. While working for the Township, Vandette essentially performed the duties of a labourer and truck driver, but did operate equipment on an infrequent basis. For the period from June 1984 until January 11, 1985, while Aikens was off work, Vandette worked on a regular basis. With the return of Aikens, the Township laid Vandette off effective January 11, 1985. Subsequent to the January 11, 1985 lay-off, Vandette was called in to work on a very infrequent and sporadic basis.
5. During the relevant period of time, Vandette was treated by the Township, without any complaint from the union, as a person who was not covered by the terms of the collective agreement. When hired, there was no discussion between representatives of the Township and Vandette regarding a probationary period. The Township did not give Vandette the status of a probationary employee nor did it ever advise him that he successfully completed a probationary period. It is the practice of the Township to advise the union when it hires a probationary employee, but the union was not so advised when Vandette was hired. Although not officially advised by the Township, Lewis was aware of the Township's resolution to hire Vandette as well as the circumstances of his employment. The Township never checked off union dues from Vandette's pay and remit same to the union. In January 1985, the Township forwarded Vandette's initiation fee to the union in response to a request from Vandette to do so. After becoming a member of the union, Vandette paid his dues directly to the union. The Township never submitted payments to the union for

health and welfare benefits on behalf of Vandette, nor did it make OHIP payments on his behalf. Vandette was paid a wage rate identical to the rates set out in the collective agreement. Jagger testified that Vandette received the rate set out in the collective agreement not because he was in the bargaining unit but because the Township took the view that it was appropriate to pay him the collective agreement rate since he performed the same work as the bargaining unit employees.

6. In April 1986, the position of equipment operator became vacant upon the resignation of Lloyd Aikens. Vandette was one of a number of applicants who applied for the job. The Township selected Harold Brown for the job rather than Vandette. Prior to applying for the job, Vandette contacted Lewis who gave him some advice regarding how he should apply for the job. Lewis testified that at the time he gave the advice to Vandette he told him he was not an employee in the bargaining unit. Although Vandette denied that Lewis advised him that he was not in the bargaining unit when he testified in chief, he admitted in cross-examination that it was possible that Lewis told him something to this effect but that it had no impact on him since he considered being a union member and being in the bargaining unit as the same thing. After discovering that he was an unsuccessful applicant, Vandette again contacted Lewis for assistance. The alleged unresponsive position of Lewis forms the basis of Vandette's section 68 complaint. After reviewing the evidence regarding the discussions Vandette had with Lewis on the two occasions referred to above, the Board found it to be of little assistance in determining whether Vandette was an employee in the bargaining unit at the relevant time.

7. Vandette testified concerning the circumstances of his employment with the Township and various discussions he had with Township employees and bargaining unit employees, particularly the union's steward. We reviewed this evidence carefully in order to determine whether the parties to the bargaining relationship had ever acted in a manner inconsistent with the position that Vandette was not an employee in the bargaining unit. Vandette's evidence in this respect was of little assistance to the Board on the status issue. The Board is satisfied that his decision to join Local 1036 was not forced upon him, but was one he made freely since he felt it would be in his long-term best interests. Vandette testified that no one had advised him that he was not in the bargaining unit or that there was a distinction between being a member of the union and being an employee in the bargaining unit. He conceded that he was aware of the benefits paid to bargaining unit employees and that he never complained to the Township or Local 1036 concerning the fact that he did not receive any of the benefits.

8. Lewis and Jagger both testified concerning the scope of the collective agreement. Lewis has been the business manager for Local 1036 for approximately fourteen years and he has been involved in negotiating and administering the collective agreements covering the Township's road department employees since 1973. He testified that the collective agreement covers all permanent employees of the Township, i.e. those who served a probationary period and work 40 hours a week. In his view, the collective agreement never was intended to cover part-time or casual employees and was never applied to such employees. Lewis noted in his evidence that the collective agreement had never been applied to students as well as other employees of the Township, such as firemen. In a similar vein, Jagger testified that the collective agreement was never intended to cover an employee in Vandette's position. Jagger referred to a previous occasion in which the Township employed a part-time labourer for a few months and did not treat that person as falling within the scope of the collective agreement.

9. Although the Board reviewed the entire collective agreement, those terms which are particularly relevant are as follows:

## ARTICLE 2 - SCOPE

- A This Agreement shall apply to all employees of the Corporation of the Township of St. Joseph, save and except persons above the rank of road superintendent and office staff.

## ARTICLE 3 - UNION RECOGNITION

- A The Corporation hereby recognizes the Union as the Sole Collective Bargaining Agent for all employees covered by Article 2 - Scope, in respect to hours of work, wages and all other conditions pertaining to this Agreement.

## ARTICLE 9 - UNION SECURITY &amp; DUES CHECK OFF

- A It is agreed and understood by the parties hereto that there shall be a compulsory check-off upon all employees who come within the limit to which this Agreement applies for and it shall continue during the period of this contract.

## ARTICLE 10 - SENIORITY

- F In hiring and promotions, it is agreed and understood that all employees will be on a sixty (60) working days probation period.

## ARTICLE 16 - HOURS OF WORK

- A The normal hours of work for all employees covered by this Agreement between May 1st to October 31st shall be forty (40) hours per week to be worked between 12:01 A.M. Monday to 12:00 P.M. Friday.
- B The normal hours of work for all employees covered by this Agreement between November 1st to April 30th shall be forty (40) hours per week to be worked between 12:01 A.M. Saturday 12:00 P.M. Friday.
- C It is understood by and between both parties that employees shall be entitled to a ten (10) minute coffee break in the morning and also a ten (10) minute coffee break in the afternoon.

Said coffee break to be on Company time.

## ARTICLE 18 - ONTARIO HEALTH INSURANCE PLAN

- A The Corporation agrees to contribute 100% of the employees cost for the Ontario Health Insurance Plan (OHIP).

## ARTICLE 19 - HEALTH &amp; WELFARE

- A The Employer agrees to contribute for welfare to Local Union 1036, Welfare Fund, at the rate of \$25.00 (twenty-five dollars) per month for each Employee covered by this Agreement, commencing February 29, 1984.

## ARTICLE 28 - DEFINITIONS

- A A PERMANENT EMPLOYEE is an employee who has successfully completed the maximum probationary period of sixty (60) days (working as per Article 16).
- B A PROBATIONARY EMPLOYEE is an employee who is serving a maximum probationary period of sixty (60) days (working as per Article 16) with the Corporation prior to being considered as a permanent employee.

10. Section 68 of the Act provides:



68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith, in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

11. Section 68 creates a duty on a trade union with respect to the representation of employees in a bargaining unit. If Vandette was not an employee covered by the relevant collective agreement, Local 1036 does not owe him a section 68 duty. The wording of the section makes it quite clear that membership in the union is not what attracts the section 68 obligation. The Board made this point in *Cameron Douglas Wonch*, [1984] OLRB Rep. Nov. 1659 at paragraph 4:

4. ... Membership in a union is not the same as membership in a particular bargaining unit. Nor, for the purposes of section 68, is membership *in the union* a material consideration. The obligation under section 68 is owed to employees in the bargaining unit whether or not they are union members and, conversely, no section 68 duty is owed to union members who are not also members of a bargaining unit which the union is obligated to fairly represent. ...

12. In an effort to determine whether a person is employed in the bargaining unit, the Board inevitably must focus on the terms of the collective agreement, primarily the scope clause. Interpreting the scope clause in itself may provide the answer, but then again it might not. The language used in the scope clause when viewed with the terms of the collective agreement generally may indicate that the language of the scope clause does not reflect the realities of the relationship between the parties. To a considerable extent, the scope of the collective agreement is determined by the parties to a collective agreement not only with respect to the language they use in the collective agreement, but also with respect to their practice which may extend over a long period of time. One must often, therefore, examine the collective agreement as a whole in conjunction with the practice of the parties in order to make an assessment regarding the bargaining unit status of certain individuals.

13. Support for the general comments contained in the preceding paragraph can be found in a number of Board cases and in arbitration decisions. A useful review of this jurisprudence is found in the following paragraphs in *Ben Bruinsma and Sons Limited*, [1984] OLRB Rep. March 404 beginning at page 409:

18. In seeking to ascertain the scope of the bargaining unit covered by a collective agreement, generally one need look no further than the recognition clause contained in the agreement. However, at times a collective agreement when read as a whole may indicate that the agreement was not in fact meant to cover certain employees, even though they were not expressly excluded by the terms of the recognition clause. For example in *Re Town of Markham and Canadian Union of Public Employees, Local 1219* (1973), 3 L.A.C. (2d) 237 (Brandt), the issue arose as to whether temporary employees were covered by a collective agreement. The scope clause of the agreement stated that the employer recognized the union as the bargaining agent for "all employees" except for a number of enumerated exclusions, one of which was not temporary employees. After reviewing a number of subsequent clauses in the agreement, however, the arbitration board concluded the parties had intended to exclude temporary employees from the unit, and that the term "all employees" in the recognition clause "does not extend to temporary employees". A somewhat similar conclusion was reached by this Board in *Re Murphy & Morrow Limited* [1962] OLRB Rep. March 415. In that case a local of the Operative Plasterers and Cement Masons International Association had entered into a collective agreement with a recognition clause which appeared to cover all employees of an employer. However, a number of other provisions in the collective agreement, particularly one which stated that the agreement applied to all work included in the jurisdiction of the union as outlined in its constitution, led the Board to conclude that the agreement was only intended to cover plasterers and plasterers' apprentices and not any other classes of employees.

19. Just as other provisions in a collective agreement may detract from a scope clause, so also they may indicate that the parties intended a broadly written scope clause to be applied literally.

In *Rockwell International Corporation* [1981] OLRB Rep. June 780 a collective agreement negotiated in the United States had a scope clause with no geographic limitation. Certain articles in the agreement including a reference to transportation costs and differing pay levels depending on whether one was working in the United States or Canada or elsewhere led the Board to conclude that the parties had in fact intended the agreement to apply outside of the United States.

20. In certain cases, the Board has looked beyond the terms of a collective agreement in determining the bargaining unit covered by the agreement and has also taken into account the practice of the parties. For example, in *Toronto Plastering Company Limited* [1968] OLRB Rep. Feb. 1108 a collective agreement entered into by the Operative Plasterers' and Cement Masons' International Association of the United States and Canada purported in its recognition clause to cover "all employees" of a company. However, based on evidence that the provisions of the agreement, including the stipulated wage rates, had been applied to plasterers and apprentice plasterers employed by the company but not labourers, the Board concluded that the parties had not intended that labourers be bound by the agreement.

21. A case similar in certain respects to the one now before us was *Evans Lumber and Builders Supply Ltd.* 58 CLLC ¶18,117. In that case a collective agreement purported to cover all employees of a company. The agreement, however, contained no wage rates for resilient floor layers and their apprentices. In a brief decision relating to the status of the resilient floor layers, the Board stated:

"After carefully reviewing all the evidence, including the fact that wages and other working conditions of the resilient floor layers and their apprentices are not governed by this agreement, the Board is satisfied that it was not intended to apply and does not in fact apply to the resilient floor layers..."

Although the decision is not clear with respect to the issue, it appears that the Board based its decision on more than just a lack of a wage schedule for floor layers in the collective agreement.

22. The lack of a set wage in a collective agreement for a classification of employees does not of necessity lead to a conclusion that those employees are not within the bargaining unit covered by the collective agreement. Rather, it is possible that the parties contemplate that such wages will be arrived at in consultation between the employer and the union, or between the employer and the employees concerned, and that failing any such agreement, the wage rates will be unilaterally set by the employer. In *Re Stearns - Roger Canada Ltd. and Millwrights Union, Local 2736 (No. 1)* (1972) 2 L.A.C. (2d) 102 (Lindholm), it was held that a foreman who was an "employee" for the purposes of the British Columbia *Labour Relations Act*, but for whom no wage rate had been set out in the collective agreement (the foreman settling his wage directly with the employer), was an employee in the bargaining unit covered by the collective agreement. It is also possible that the parties may not have included a wage schedule for certain employees in a collective agreement simply because they neglected to put their minds to the issue. In *Re International Chemical Workers, Local 552 and Emery Industries (Canada) Ltd.* (1970) 21 L.A.C. 163 (Weatherill) there were two truck drivers who appeared to be covered by the general wording in the scope clause of a collective agreement. The schedule of wage rates attached to the agreement, however, made no mention of truck drivers. The arbitrator was of the view that the truck drivers had not been in the minds of the parties when they negotiated the collective agreement. Nevertheless, the arbitrator concluded that the drivers did come within the bargaining unit covered by the collective agreement.

23. We believe that the various Board and arbitration cases stand for the following principles. The scope of the bargaining unit covered by a collective agreement can generally be ascertained by the recognition clause in the agreement. However, a consideration of the remainder of the collective agreement may indicate that the recognition clause is not in fact an accurate reflection of the bargaining unit covered by the agreement. Where a reading of the agreement as a whole leaves an uncertainty as to the scope of the bargaining unit, one can seek to ascertain the intent of the parties to the agreement by way of extrinsic evidence, including evidence as to how the agreement has been applied. The fact that a collective agreement does not contain a wage rate for certain employees is one indication that the agreement was not meant to cover those employees, although the lack of a wage rate by itself may not be sufficient to support such a conclusion.

14. There is support in the case law for the proposition that one cannot ignore the evidence of the parties to the bargaining relationship to the effect that certain employees are not covered by a particular collective agreement. In *Gerald M. Massicotte and Teamsters Union Local 938*, [1980] 1 Can. LRB 427 (C.L.R.B.), the Canada Board noted that the evidence before it from the union and employer representatives regarding their intention is strong evidence, although not conclusive. In *Consolidated Fastfrate Limited*, [1984] OLRB Rep. May 691 at paragraph 16, the Board noted that "where the parties to the collective agreement agree, as they do on the facts before us, that it was never their intention to grant recognition or be recognized for a certain group of employees, the Board must have compelling evidence to lead it to a conclusion contrary to this position". In both cases, the Boards cautioned that such evidence must be carefully reviewed in light of all of the facts. The Board must be satisfied that such evidence is not conveniently being tendered in order to avoid an unfavourable result in a particular case. In addition, I would also note that in reviewing all of the circumstances, the fact that the terms of the collective agreement were never applied to a particular individual or group of employees is also not determinative. Such a situation may arise as a result of a mistake or simply the inadvertence of the trade union. With respect to these issues, only a review of all of the facts and the terms of the collective agreement will determine the probable intention of the parties.

15. The scope clause of the collective agreement in this matter does not exclude temporary, part-time or casual employees. But in order to decide the issue before the Board, it is necessary to ask whether the scope clause was intended to include such a category of employees. Article 28 of the collective agreement defines a permanent employee as a person who has successfully completed the probationary period and a probationary employee as a person who is serving a probationary period prior to being considered a permanent employee. Article 10(F) provides that all employees will be on a sixty working days' probationary period. When reference in Article 28 is made to the probationary period, it is explicitly noted that the employee must be working as per Article 16. In essence, Article 16 provides that the normal hours of work for all employees covered by the agreement shall be 40 hours per week. A review of these provisions raises some doubt concerning whether the parties to the collective agreement in using the word "employees" in Articles 2 and 3 intended to cover temporary, part-time or casual employees. It would be highly unlikely for the parties to have intended that certain employees in the bargaining unit would not have to satisfactorily complete a probationary period. It would appear that the probationary period is based on an employee working a regular forty-hour work week. These considerations at least lead the Board to conclude that the question of whether the parties intended to cover temporary, part-time or casual employees is not free of ambiguity. The practice of the parties to the collective agreement, however, is anything but ambiguous.

16. The Board is satisfied that the collective agreement has never been applied to Vandette. Between June 1984 and January 1985, Vandette worked on a temporary basis in the sense that he was taking the place of a permanent employee who was on Workers Compensation Benefits. After his lay-off in January 1985, he was not called in until June 1985 and worked approximately thirty-seven days in the remaining months of 1985. From January 1986 until the Township hired Brown for the equipment operator position, Vandette worked approximately eleven days and earned \$563.36 from the Township in 1986. During the time he worked for the Township, the only term of Vandette's employment consistent with the terms of the collective agreement was a wage rate. With respect to this matter, the Board accepts the evidence of Jagger that Vandette was paid the same as bargaining unit employees for the work he performed, not because he was considered to be in the bargaining unit but because an independent decision was made that such a rate was fair in the circumstances. The Township, with the knowledge of the union, did not pay health and welfare benefits nor OHIP on Vandette's behalf, and it did not check off union dues. The conduct of the Township and Local 1036 is consistent with the evidence their representatives gave before the



Board to the effect that it was never their intention to cover employees in Vandette's position by the terms of the collective agreement. The manner in which Vandette was treated by the Township is consistent with the way in which it treated a previous casual employee and students. Vandette's conduct is consistent with a view on his part that he was not covered by the terms of the collective agreement. The Board is satisfied in the circumstances of this case that the evidence of the parties' representatives to the effect that they never intended the collective agreement to cover persons in Vandette's position is reliable. In addition, the Board is satisfied that the non-application of the collective agreement to Vandette is consistent only with the conclusion that the parties to the collective agreement did not intend persons in his position to be covered.

17. After reviewing the terms of the collective agreement and the practice of the parties, the Board finds that Vandette was not an employee in the bargaining unit during the relevant period of time. Thus, this complaint as it relates to the section 68 allegation against the union could be dismissed on the basis of the complainant's lack of status. However, in deference to the able submissions of counsel regarding the merits, the Board finds it appropriate to note that, for the reasons set forth below, the complaint would not be successful even if the complainant did have status to bring it.

18. D. Vandette, Lloyd Aikens and Denis Reid were called to give evidence in support of the section 68 matter. J. Lewis testified for the respondent trade union. In making its factual determinations on this aspect of the case, the Board again has weighed and assessed all of the evidence, including the credibility of the witnesses. As will become evident, the disposition of the merits of the section 68 matter is in large part determined once one has decided who to believe. As a general comment, the Board prefers the evidence given by Lewis where that evidence was in conflict in any material way with the evidence given by Vandette.

19. As previously set out in paragraph 4 of this decision, the position of equipment operator became vacant in April 1986 when Lloyd Aikens resigned. Prior to applying for the job, Vandette contacted Lewis since he had heard rumours that the Township had already determined who would be hired. In their brief conversation, Vandette explained why he was calling and Lewis advised him to put in two applications, one when the job was posted internally and one if and when the job was advertised externally. The conflicts regarding this conversation concern whether Lewis raised the issue of Vandette's bargaining unit status and explained why Vandette should put in two applications. Lewis testified that he told Vandette that he was not in the bargaining unit but that he should, in effect, cover all the bases by putting in two applications. When Vandette testified concerning the preliminary matter, he admitted in cross-examination that it was possible Lewis told him that he was not in the bargaining unit but it had no impact on him since he considered being a union member and being in the bargaining unit as the same thing. When he gave his evidence on the merits of the section 68 matter, Vandette testified that he was positive Lewis did not say anything about his bargaining unit status and that Lewis did not explain why he should put in two applications. The Board is satisfied that during this conversation, Lewis did raise the issue of Vandette's bargaining unit status as well as explain why Vandette should put in two applications. Vandette's evidence when testifying on the merits of the complaint was not consistent with his earlier evidence on the matter. Moreover, it is highly improbable that Lewis would advise Vandette to make an external application without Vandette asking why and without Lewis giving an explanation which involved mentioning Vandette's bargaining unit status.

20. The Township Council met to consider the applications for the equipment operator position on May 6, 1986. It was shortly after this date that Vandette was advised he was not the successful applicant and that the Township had hired Harold Brown, a former employee of the Township.

21. A considerable amount of evidence was called by the complainant to prove that he was qualified to perform the equipment operator job. The primary focus of a fair representation complaint is not on whether an employer has actually contravened the collective agreement but rather on the conduct of the trade union. However, it is inevitable that some evidence relating to the alleged breach of the collective agreement will be called to give the complaint some context. Such evidence may also be of some relevance to the issue of whether the union has breached section 68 of the Act. For instance, evidence which established a clear violation of the collective agreement may have an impact on the Board's assessment of the union's decision not to arbitrate a grievance. The evidence relating to the complainant's qualifications as an equipment operator did not assist the complainant in establishing a contravention of section 68.

22. Apart from driving a truck, Vandette operated a grader relatively infrequently between June 1984, when he was hired, and January 1985 when Lloyd Aikens returned from an absence due to injury. When Aikens returned, Vandette no longer operated the grader for the Township. Prior to working for the Township, Vandette never operated a grader. While giving his evidence-in-chief, Vandette testified that no one complained about the way he operated equipment. However, in cross-examination he admitted that a rate-payer complained about his operation of the grader on one occasion. D. Reid, a Council member until November 1985, who was called to give evidence by the complainant, never observed Vandette operate the grader but recalled that the Reeve expressed the view that Vandette was not adapting and was slower than others. On behalf of the complainant, Lloyd Aikens testified that Vandette did a good job "for a guy with his experience". During cross-examination, Aikens admitted that some of the other applicants for the job were better qualified than Vandette. Prior to the equipment operator position becoming vacant, Vandette worked for another Township and early in 1985 was fired for damaging road equipment. Rather than supporting the complainant's section 68 allegation, the evidence raises concerns about Vandette's credibility and his qualifications as a grader operator.

23. Vandette was quite unhappy about not getting the equipment operator position. He wrote the Council, contacted his job superintendent as well as a local MPP in order to express his concerns. He also sought out legal advice which resulted in the initiation of an unlawful dismissal action in September 1986 and the filing of this complaint in late October 1986. Vandette also contacted Jimmie Lewis. After some unsuccessful attempts, Vandette was able to communicate with Lewis on May 15, 1986 by telephone. There is considerable conflict between Vandette and Lewis concerning the substance of this conversation. According to Vandette, the conversation lasted approximately twenty-three minutes and began with Vandette telling Lewis that the Township hired a friend for the equipment operator job rather than himself. Vandette testified that Lewis only responded by saying that he was not going to do anything about it. The discussion to this point took less than a minute. For the remaining time, Lewis talked about an unrelated matter, namely the way the chief and council of the Garden River Indian Reserve were acting. Vandette, who was paying for this call, testified that he did not ask Lewis to explain why he would not assist him and that Lewis offered no such explanation. Vandette agrees he did not ask Lewis to file a grievance on his behalf, or for that matter, to do anything on his behalf.

24. The evidence of Lewis concerning the May 15th discussion is significantly different from Vandette's. Lewis agreed that the telephone conversation lasted more than twenty minutes and began with Vandette advising him that a person who was related to a Council member got the equipment operator job. Since Vandette mentioned that he had the qualifications and should have been awarded the job, they got into a discussion of Vandette's qualifications. Vandette advised Lewis that he was not very specific regarding his qualifications in his applications. Lewis told Vandette that if he had greater qualifications than the successful applicant, he would go and discuss the matter with the Clerk of the Township, even though he felt Vandette was not in the bargaining

unit. It was decided that Vandette would provide Lewis with a letter from an employer regarding Vandette's qualifications and when Lewis received such information he would discuss the matter with the Clerk. Lewis could not recall discussing the Garden River Indian Reserve with Vandette. Lewis did not receive any information from Vandette, and the next time he heard about the matter was when he received notice of this complaint from the Board approximately five months later. Lewis did not raise Vandette's concerns with the Township. He testified that in his experience there was no point in having such a discussion with respect to a matter such as this unless one had some evidence to work with. This was why he asked Vandette for some supporting documentation and indicated to Vandette that he would await receipt of the information before raising the matter with the Township.

25. With respect to their conversation of May 15, 1986, the Board prefers the evidence of Lewis. Vandette's version of the conversation is quite improbable. It is difficult to accept that Lewis's response was simply "I'm not going to do anything about it". Vandette would have the Board believe that when faced with this response he did not ask for a reason. He also would have us believe that he listened to Lewis talk about an unrelated matter for over twenty minutes at his expense. The response attributed to Lewis by Vandette is inconsistent with the earlier discussion between them when Lewis was quite prepared to provide Vandette with some advice regarding applying for the job, even though he was of the view that he was not in the bargaining unit. It is not surprising that Lewis would respond in the way he describes during the discussion since although he felt Vandette was not in the bargaining unit, he was still a member of the union. Counsel for the complainant suggests that the Board accept Vandette's evidence since it is unbelievable that Vandette would not comply with Lewis' request for information given the other efforts he has made in pursuit of his goal. But this presumes Vandette was able to obtain a reference from an employer concerning his qualifications to operate equipment. The evidence concerning Vandette's qualifications suggests that he might well have been unable to secure the kind of evidence Lewis requested.

26. Having accepted Lewis' version of the May 15, 1986 conversation, the Board turns to the question of whether the union contravened section 68 of the Act. Counsel for the complainant argued that Lewis was aware of Vandette's concerns and should have pursued the matter with the Township. His failure to do so, counsel submits, is arbitrary within the meaning of section 68. The Board does not agree. Vandette did not request Lewis to do anything. After discussing the matter, there was an understanding between them that Vandette would provide some evidence of his qualifications before Lewis approached the Township Clerk. In reviewing all the circumstances, the Board does not find Lewis' rationale for not approaching the Township without further evidence to be unreasonable. Having regard to all of the evidence, the Board finds that the complainant has not established that the conduct of Lewis was arbitrary, discriminatory or in bad faith. Therefore, even if Vandette was an employee in the bargaining unit at the relevant time, the section 68 aspect of this complaint would fail.

27. Accordingly, this complaint is dismissed.

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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JANUARY 1988

### APPLICATIONS FOR CERTIFICATION

#### Bargaining Agents Certified Without Vote

**1293-86-R:** Great Lakes Fishermen & Allied Workers' Union (Applicant) v. Family Fishery Company (Respondent)

Unit: "all employees of the respondent engaged in fishing on Lake Erie, save and except boat captain and persons above the rank of boat captain" (7 employees in unit) (*Clarity Note*)

**1845-86-R:** Great Lakes Fishermen & Allied Workers' Union (Applicant) v. S. Catrini Fisheries Inc. (Respondent)

Unit: "all employees of the respondent engaged in fishing on Lake Erie, save and except those above the rank of boat captain" (5 employees in unit) (*Clarity Note*)

**0144-87-R:** United Food & Commercial Workers International Union (Applicant) v. J. B. Food Industries Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Municipality of Halton, save and except supervisors, persons above the rank of supervisor, sales persons, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (115 employees in unit) (*Having regard to the agreement of the parties*)

**1251-87-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Street Construction Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

**1263-87-R:** Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Mentor Hosts Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at 110 Lombard Street in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff" (38 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**1804-87-R:** Canadian Union of Public Employees (Applicant) v. Gooden Holdings Ltd. (Respondent)

Unit: "all employees of the respondent at its Ottawa Centre Nursing Home in Ottawa regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except persons above the rank of supervisor, registered and graduate nurses, Activities Director, office and clerical staff and employees in bargaining units for which any trade union held bargaining rights as of October 1, 1987" (22 employees in unit) (*Having regard to the agreement of the parties*)

**1870-87-R:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 71 (Applicant) v. Willex Mechanical Ltd. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all other sectors in the Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit) (*Clarity Note*)

**1924-87-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Camaro Enterprises Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the District of Thunder Bay engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit)

Unit #2: "all construction labourers and truck drivers in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (21 employees in unit)

**1961-87-R:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers (Applicant) v. Volcano Inc. (Respondent)

Unit: "all boilermakers and boilermakers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all boilermakers and boilermakers' apprentices in the employ of the respondent in all other sectors in the United Counties of Stormont, Dundas and Glengarry, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

**2030-87-R:** Labourers' International Union of North America, Local 1059 (Applicant) v. Del-Ko Paving & Construction Co. Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

**2110-87-R:** Labourers' International Union of North America, Local 183 (Applicant) v. 7-11 Pools & Metal Fab Ltd., 7-11 Pool Distributors Ltd. & 7-11 Pool Accessories Ltd. (Respondents)

Unit #1: "all employees of 7-11 Pool Distributors Ltd. in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, security guards, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (2 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of 7-11 Pool Accessories Ltd. in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, security guards, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (2 employees in unit)

**2142-87-R:** United Steelworkers of America (Applicant) v. Caddiford Investments Ltd. (Respondent)

Unit: "all employees of the respondent in its M.B.M. Ceramics Division in the Municipality of Metropolitan Toronto, save and except supervisors and foremen, persons above the rank of supervisor and foreman, office,



clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (70 employees in unit) (*Having regard to the agreement of the parties*)

**2152-87-R:** Canadian Union of Public Employees (Applicant) v. William W. Creighton Centre (Respondent) v. Group of Employees (Objectors)

Unit #1: “all employees of the respondent in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, office and clerical staff, and employees regularly employed for not more than 24 hours per week” (7 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: “all employees of the respondent regularly employed for not more than 24 hours per week, in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, and office and clerical staff” (19 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**2193-87-R:** Ontario Catholic Occasional Teachers’ Association (Applicant) v. Sault Ste. Marie District Roman Catholic Separate School Board (Respondent)

Unit: “all occasional teachers employed by the respondent in its schools in the District of Algoma, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*” (75 employees in unit) (*Clarity Note*)

**2214-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Dumont Dry-wall & Metal & Ceiling (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

**2281-87-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Scoralin Dillingham, A Joint Venture (Respondent)

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors within a radius of 57 kilometres (approximately 35 miles) of the City of Sudbury Federal Building, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

**2302-87-R:** The Canadian Union of Operating Engineers & General Workers, Local 111 (Applicant) v. ABC Taxi (Brockville) Ltd., and Safedrive Inc. c.o.b. as City Cab (Respondents)

Unit: “all employees of the respondent in the City of Brockville, save and except persons in bargaining units for which any trade union held bargaining rights as of November 13, 1987” (4 employees in unit) (*Having regard to the agreement of the parties*)

**2316-87-R:** Labourers’ International Union of North America, Local 506 (Applicant) v. Lyndock Construction Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the

Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

**2327-87-R:** United Steelworkers of America (Applicant) v. Norton Steel Company Limited, c.o.b. as Norton Steel & Tube (Respondent)

Unit: "all employees of the respondent in the City of Mississauga, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (22 employees in unit) (*Having regard to the agreement of the parties*)

**2340-87-R:** Canadian Union of Public Employees (Applicant) v. Hawthorne-on-Essex Daycare Corporation (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, and bookkeeper" (14 employees in unit) (*Having regard to the agreement of the parties*)

**2350-87-R:** Canadian Union of Restaurant & Related Employees, Hotel Employees & Restaurant Employees Union, Local 88 (Applicant) v. Cara Operations Ltd. (Respondent)

Unit #1: "all waitresses, waiters, buspersons, kitchen staff, cashiers and bartenders employed by the respondent at its Swiss Chalet Restaurant located at 205 Marycroft Avenue, Woodbridge, save and except assistant hostesses, persons above the rank of assistant hostess, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (19 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all waitresses, waiters, buspersons, kitchen staff, cashiers and bartenders regularly employed for not more than 24 hours per week and students employed during the school vacation period by the respondent at its Swiss Chalet Restaurant located at 205 Marycroft Avenue, Woodbridge" (34 employees in unit) (*Having regard to the agreement of the parties*)

**2353-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Art's Woodwork Ltd. (Respondent)

Unit: "all employees of the respondent in the Town of Newcastle, save and except foremen, persons above the rank of foreman, and office and sales staff" (8 employees in unit) (*Having regard to the agreement of the parties*)

**2370-87-R:** Toronto Typographical Union, No. 91 (Applicant) v. Canadian Corporate Management Company Ltd. (Respondent)

Unit: "all employees of the respondent at its Cutler Brands and Designs division in Metropolitan Toronto, save and except supervisors and forepersons, persons above the rank of supervisor and foreperson, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (48 employees in unit) (*Having regard to the agreement of the parties*)

**2372-87-R:** Ontario Public Service Employees Union (Applicant) v. North Bay & District Health Unit (Respondent)

Unit: "all employees of the respondent in the City of North Bay, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, executive secretary, accountant, speech pathologist, nurses, homemakers and employees in bargaining units for which any trade union held bargaining rights as of November 24, 1987" (11 employees in unit) (*Having regard to the agreement of the parties*)

**2373-87-R:** Brunner In-House Association (Applicant) v. Brunner Manufacturing & Sales Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Niagara Falls, save and except foremen, persons above the rank of foreman, and office and sales staff" (40 employees in unit) (*Having regard to the agreement of the parties*)

**2382-87-R:** United Steelworkers of America (Applicant) v. 411241 Ontario Ltd., c.o.b. as CC Vending (Respondent)

Unit: "all employees of the respondent in the City of Waterloo and the City of Kitchener, save and except managers, persons above the rank of manager, and office staff" (12 employees in unit) (*Having regard to the agreement of the parties*)

**2401-87-R:** Ontario Nurses' Association (Applicant) v. The Almonte Nursing Home (Respondent)

Unit: "all registered and graduate nurses employed by the respondent in Almonte, save and except Director of Nursing and persons above the rank of Director of Nursing" (6 employees in unit) (*Having regard to the agreement of the parties*)

**2441-87-R:** International Association of Machinists & Aerospace Workers (Applicant) v. Maitland Lewis Enterprises Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Sault Ste. Marie, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (11 employees in unit) (*Having regard to the agreement of the parties*)

**2442-87-R:** Canadian Union of Public Employees (Applicant) v. Junction Day Care Centre (Respondent)

Unit #1: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (6 employees in unit)

Unit #2: "all employees of the respondent in Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors and those persons above the rank of supervisor" (5 employees in unit) (*Having regard to the agreement of the parties*)

**2502-87-R:** United Steelworkers of America (Applicant) v. Alman Publishers & Printers (Espanola) Ltd. (Respondent)

Unit: "all employees of the respondent in Sudbury, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (45 employees in unit) (*Having regard to the agreement of the parties*)

**2512-87-R:** United Rubber, Cork, Linoleum & Plastic Workers of America, AFL:CIO:CLC (Applicant) v. VS Services Ltd. (Respondent)

Unit: "all employees of the respondent at the General Tire Plant in Barrie, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (6 employees in unit) (*Having regard to the agreement of the parties*)

**2524-87-R:** Ontario Secondary School Teachers' Federation (Applicant) v. The Board of Education for the City of Windsor (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 494 (Intervener #1) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 552 (Intervener #2), v. Canadian Union of Public Employees (Intervener #3)

Unit: "all employees of the respondent employed as Speech Pathologists, Psychologists, Psychometrists, Social Worker/Attendance Councillors, save and except the Superintendent of Special Education and Special



Services, and those above the rank of Superintendent, and employees in bargaining units for whom any trade union held bargaining rights as of January 8, 1988" (20 employees in unit) (*Having regard to the agreement of the parties*)

**2539-87-R:** The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Aztec Contractors Inc. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all other sectors in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

**2549-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Bankview Interior Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit)

**2577-87-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Treves-Lear, Inc. (Respondent)

Unit: "all employees of the respondent in the Town of Lindsay, save and except foremen, persons above the rank of foreman, and office and sales staff" (8 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**2586-87-R:** Canadian Union of Public Employees (Applicant) v. The Corporation of the City of Cornwall (Respondent)

Unit: "all office, clerical and technical employees of the respondent in the City of Cornwall, save and except assistant managers and supervisors, those above the rank of assistant manager and supervisors, secretary to the Mayor, secretary to the Chief Administrator, secretary to the City Clerk, secretary to the Director of Finance and Administration, secretary to the Director of Community Services, secretary to the Director of Economic Development, secretary to the Director of Engineering and Planning, secretary to the Manager of Public Works, secretary to the Manager of Engineering Services, and employees of the Human Resources Department" (112 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**2589-87-R:** Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild, AFL:CIO:CLC (Applicant) v. Brabant Newspapers Ltd. (Respondent)

Unit: "all employees of the respondent in its editorial department in the Regional Municipality of Hamilton-Wentworth and the Town of Pelham, save and except the managing editor, persons above the rank of managing editor, and the secretary to the managing editor" (19 employees in unit) (*Having regard to the agreement of the parties*)

**2616-87-R:** Ontario Nurses' Association (Applicant) v. M.C.I. Medical Clinics, Inc. (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent at 4099 Erin Mills Parkway, Mississauga, save and except Clinic Manager and persons above the rank of Clinic Manager" (6 employees in unit) (*Having regard to the agreement of the parties*)

**2622-87-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Bradscot Construction Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough, and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

**2632-87-R:** United Steelworkers of America (Applicant) v. Emco Ltd. (Respondent)

Unit: "all employees of the respondent at its plastics plant in Brampton, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except forepersons, persons above the rank of foreperson, and office and sales staff" (51 employees in unit)

**2684-87-R:** Sheet Metal Workers' International Association, Local 47 (Applicant) v. Manotick Sheet Metal Contracting Ltd. (Respondent)

Unit: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

**Bargaining Agents Certified Subsequent to a Pre-Hearing Vote**

**1269-86-R:** Great Lakes Fishermen & Allied workers' Union (Applicant) v. F. Causarano Fishery Limited (Respondent)

Unit: "all employees of the respondent engaged in fishing on Lake Erie, save and except those above the rank of boat captain" (7 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters' list		7
Number of persons who cast ballots	7	
Number of ballots marked in favour of applicant		5
Number of ballots marked against applicant		0
Ballots segregated and not counted		2

**1272-86-R:** Great Lakes Fishermen & Allied Workers' Union (Applicant) v. A. Figliomeni & Sons Ltd. (Respondent)

Unit: "all employees of the respondent engaged in fishing on Lake Erie, save and except those above the rank of boat captain" (15 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters' list		15
Number of persons who cast ballots	15	
Number of ballots marked in favour of applicant		10
Number of ballots marked against applicant		5

**1279-86-R:** Great Lakes Fishermen & Allied Workers' Union (Applicant) v. Batista Fisheries Ltd. (Respondent)

Unit: "all employees of the respondent engaged in fishing on Lake Erie, save and except those above the rank of Boat Captain" (7 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters' list		7
Number of persons who cast ballots	7	
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list		5

Number of segregated ballots cast by persons whose names appear on voters' list	2	
Number of ballots marked in favour of applicant		3
Number of ballots marked against applicant		2
Ballots segregated and not counted		2

**1280-86-R:** Great Lakes Fishermen & Allied Workers' Union (Applicant) v. Four Brothers Fishing Co. Limited (Respondent)

Unit: "all employees of the respondent engaged in fishing on Lake Erie, save and except those above the rank of boat captain" (9 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters' list		9
Number of persons who cast ballots	8	
Number of ballots marked in favour of applicant		5
Number of ballots marked against applicant		2
Ballots segregated and not counted		1

**1286-86-R:** Great Lakes Fishermen & Allied Workers' Union (Applicant) v. James Taylor Fishery Ltd. (Respondent)

Unit: "all employees of the respondent engaged in fishing in and out of Wheatley, save and except those above the rank of boat captain" (8 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters' list		8
Number of persons who cast ballots	8	
Number of ballots marked in favour of applicant		7
Number of ballots marked against applicant		1

**1287-86-R:** Great Lakes Fishermen & Allied Workers' Union (Applicant) v. Simmons Fishery Ltd. (Respondent)

Unit: "all employees of the respondent engaged in fishing on Lake Erie, save and except those above the rank of Boat Captain" (15 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters' list		15
Number of persons who cast ballots	15	
Number of segregated ballots cast by persons whose names appear on voters' list	3	
Number of ballots marked in favour of applicant		7
Number of ballots marked against applicant		5
Ballots segregated and not counted		3

**1290-86-R:** Great Lakes Fishermen & Allied Workers' Union (Applicant) v. Harvey Getty & Sons Ltd. (Respondent)

Unit: "all employees of the respondent engaged in fishing on Lake Erie, save and except those above the rank of Boat Captain" (10 employees in unit)

Number of names of persons on revised voters' list		10
Number of persons who cast ballots	10	
Number of segregated ballots cast by persons whose names appear of voters' list	4	
Number of ballots marked in favour of applicant		5
Number of ballots marked against applicant		1
Ballots segregated and not counted		4

**1291-86-R:** Great Lakes Fishermen & Allied Workers' Union (Applicant) v. Favignana Fishing Co. Ltd. (Respondent)



Unit: "all employees of the respondent engaged in fishing on Lake Erie, save and except those above the rank of Boat Captain" (11 employees in unit)

Number of names of persons on revised voters' list		11
Number of persons who cast ballots	11	
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	10	
Number of segregated ballots cast by persons whose names appear on voters' list	1	
Number of ballots marked in favour of applicant		6
Number of ballots marked against applicant		4
Ballots segregated and not counted		1

**1292-86-R:** Great Lakes Fishermen & Allied Workers' Union (Applicant) v. 538391 Ontario Inc. (Respondent)

Unit: "all employees of the respondent engaged in fishing on Lake Erie, save and except boat captain and those above the rank of boat captain, and office and clerical staff" (7 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters' list		7
Number of persons who cast ballots	7	
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	6	
Number of segregated ballots cast by persons whose names appear on voters' list	1	
Number of ballots marked in favour of applicant		6
Number of ballots marked against applicant		0
Ballots segregated and not counted		1

**1588-87-R:** International Woodworkers of America (Applicant) v. Wire Rope Industries Ltd. (Respondent) v. Lumber & Sawmill Workers' Union, Local 2693, of the United Brotherhood of Carpenters & Joiners of America (Intervener)

Unit: "all employees of the respondent at Thunder Bay, save and except non-working forepersons, persons above the rank of non-working foreperson, and outside salespersons" (3 employees in unit)

Number of names of persons on revised voters' list		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of applicant		3
Number of ballots marked in favour of intervener		0

**1835-87-R:** Canadian Union of Public Employees (Applicant) v. Essex County Association for the Mentally Retarded (Respondent)

Unit: "all employees of the respondent in the County of Essex regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff, drivers, persons employed in a vocational training program, and persons employed on temporary projects financed in whole or in part by municipal and provincial funding" (56 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		56
Number of persons who cast ballots	22	
Number of ballots marked in favour of applicant		16
Number of ballots marked against applicant		6

**2065-87-R:** Canadian Paperworkers Union (Applicant) v. Northern Wood Preservers Inc. (Respondents) v. Office & Professional Employees International Union, Local 236 (Intervener)

Unit: "all office and clerical employees of the respondent in Thunder Bay, save and except managers and persons above the rank of manager" (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		8
Number of persons who cast ballots	8	
Number of ballots marked in favour of applicant		7
Number of ballots marked in favour of intervener		1

**2118-87-R:** Canadian Paperworkers Union (Applicant) v. Le Caisse Populaire de Kapuskasing Limit e (Respondent) v. Office & Professional Employees International Union, Local 523 (Intervener)

Unit: "all employees of the respondent in the Towns of Kapuskasing and Smooth Rock Falls, and in the Municipalities of Fauquier, Moonbeam, Val Rita and Opasatika, save and except accountant, office manager, assistant credit managers, branch manager, information officers, data processing technicians, executive secretary, persons above the rank of accountant, office manager, assistant credit managers, branch manager, information officers, data processing technicians and executive secretary, janitors, students employed during the school vacation period, and students employed on a co-operative training program" (36 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		35
Number of persons who cast ballots	32	
Number of ballots marked in favour of applicant		32
Number of ballots marked in favour of intervener		0

**2119-87-R:** Canadian Paperworkers Union (Applicant) v. Northland Savings & Credit Union Ltd. (Respondent) v. Office & Professional Employees International Union, Local 523 (Intervener)

Unit: "all office, clerical and technical employees of the respondent in the Town of Kapuskasing, save and except Treasurer-Manager, Loans Manager, Head Teller, persons above the rank of Treasurer-Manager, Loans Manager and Head Teller, and students employed during the school vacation period" (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		8
Number of persons who cast ballots	7	
Number of ballots marked in favour of applicant		7
Number of ballots marked in favour of intervener		0

### **Bargaining Units Certified Subsequent to a Post-Hearing Vote**

**2226-86-R:** Canadian Union of Public Employees (Applicant) v. The Credit Valley Hospital (Respondent) v. Canadian Union of Operating Engineers & General Workers, Local 101 (Intervener) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Mississauga, save and except professional medical staff, registered, graduate and undergraduate nurses, paramedical personnel, office, technical and clerical employees, supervisors, assistant directors, head chef, persons above the rank of supervisor, assistant director and head chef, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of November 3, 1986" (162 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Notes*)

Number of names of persons on revised voters' list		162
Number of persons who cast ballots	128	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		63
Number of ballots marked against applicant		61
Ballots segregated and not counted		3

**1260-87-R:** United Steelworkers of America (Applicant) v. Herbie's Drug Warehouse Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: (see *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*)

Unit #2: "all employees of the respondent in the Township of Kingston, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except assistant managers and head cashiers and persons above the rank of assistant manager and head cashier, and pharmacists" (16 employees in unit)

Number of names of persons on revised voters' list		16
Number of persons who cast ballots	11	
Number of ballots marked in favour of applicant		9
Number of ballots marked against applicant		2

**2151-87-R:** Canadian Union of Public Employees (Applicant) v. Bethany Lodge Inc. (Respondent)

Unit: "all employees of the respondent in Unionville, save and except professional medical staff, registered, graduate and undergraduate nurses, technical, office and clerical employees, supervisors and those above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (46 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		46
Number of persons who cast ballots	46	
Number of ballots marked in favour of applicant		28
Number of ballots marked against applicant		18

**2283-87-R:** International Union of Operating Engineers, Local 796 (Applicant) v. Oshawa General Hospital (Respondent) v. Canadian Union of Operating Engineers & General Workers (Intervener #1) v. Canadian Union of Public Employees (Intervener #2)

Unit: "all stationary engineers and persons primarily engaged as their helpers employed by the respondent in its Powerhouse in Oshawa, save and except the assistant chief engineer and persons above the rank of assistant chief engineer" (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		7
Number of persons who cast ballots	8	
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	6	
Number of segregated ballots cast by persons whose names appear on voters' list	1	
Number of segregated ballots cast by persons whose names do not appear on voters' list	1	
Number of ballots marked in favour of applicant		5
Number of ballots marked in favour of intervener #1		1
Ballots segregated and not counted		2

**2328-87-R:** Teamsters Local No. 141, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. N-J Spivak Ltd. (Respondent)

Unit: "all employees of the respondent in the Township of Westminister, save and except batcher/dispatcher, persons above the rank of batcher/dispatcher, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (32 employees in unit)

Number of names of persons on revised voters' list		32
Number of persons who cast ballots	32	
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	31	
Number of segregated ballots cast by persons whose names appear on voters' list		
Number of ballots marked in favour of applicant		18
Number of ballots marked against applicant		13



### Applications for Certification Dismissed Without Vote

**3128-86-R:** Pebra Peterborough Employees Association (Applicant) v. Pebra Peterborough Inc. (Respondent) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Intervener) (82 employees in unit)

**1802-87-R:** Canadian Union of Public Employees (Applicant) v. Wallaceburg Tourist Bureau (Respondent) (1 employees in unit)

**1872-87-R:** United Food & Commercial Workers International Union (Applicant) v. 718029 Ontario Inc., c.o.b. as McArthur I.G.A. (respondent) (20 employees in unit)

**1968-87-R:** Canadian Union of Public Employees (Applicant) v. Township of Anson, Hinden & Minden (Respondent) v. Group of Employees (Objectors) (34 employees in unit)

**1996-87-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Riverside Fabricating Ltd. (Respondent) v. Group of Employees (Objectors) (44 employees in unit)

**2066-87-R:** Canadian Paperworkers Union (Applicant) v. Boise Cascade Canada Ltd. (Respondent) v. Lumber & Sawmill Workers' Union, Local 2693, of the United Brotherhood of Carpenters & Joiners of America (Intervener #1) v. International Brotherhood of Electrical Workers, Local 559 (Intervener #2)

Unit: "all employees of the respondent employed in its Kenora Sawmill complex and yard operations, including any additional operations in conjunction with the present Mill and Yard operations, save and except foremen, persons above the rank of foreman, and office and sales staff" (74 employees in unit)

**2390-87-R:** Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. CN Hotels Inc., c.o.b. as L'Hotel (Respondent) (237 employees in unit)

**2413-87-R:** Jean Minor (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) v. Robin Hood Multifoods Inc., Glassgoods Division (Intervener) v. Group of Employees (Objectors) (120 employees in unit)

### Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

**1344-87-R:** Teamsters Local No. 91, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Tannis Trading Inc. (Respondent)

Unit: "all employees of the respondent in the City of Ottawa, save and except foremen, persons above the rank of foreman, sales, office and clerical staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week" (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list		44
Number of persons who cast ballots	42	
Number of ballots marked in favour of applicant		8
Number of ballots marked against applicant		34

**1848-87-R:** Energy & Chemical Workers Union (Applicant) v. Compound Dispersers (Milton) Inc., and Baron Colour Concentrates Ltd. (Respondents)

Unit: "all employees of the respondent in Kitchener, save and except plant managers and persons above the rank of plant manager, and office and sales staff" (20 employees in unit)

Number of names of persons on revised voters' list		20
Number of persons who cast ballots	20	
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	14	
Number of segregated ballots cast by persons whose names appear on voters' list	6	
Number of ballots marked in favour of applicant		3
Number of ballots marked against applicant		12
Ballots segregated and not counted		5

**2140-87-R:** United Electrical, Radio & Machine Workers of Canada (UE) (Applicant) v. M.A. Henry Ltd. (Respondent) v. Dundas Toy Workers' Union (Intervener)

Unit: "all employees of the respondent in the Town of Dundas, save and except forepersons, persons above the rank of foreperson, and office and sales staff" (128 employees in unit)

Number of names of persons on revised voters' list		128
Number of persons who cast ballots	106	
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	104	
Number of segregated ballots cast by persons whose names appear on voters' list	2	
Number of ballots marked in favour of applicant		50
Number of ballots marked in favour of intervener		54
Ballots segregated and not counted		2

**2158-87-R:** Service Employees International Union, Local 204, S.E.I.U., AFL:CIO:CLC (Applicant) v. Peel Memorial Hospital (Respondent)

Unit: "all employees of the respondent employed as stationery engineers and persons employed as their helpers in the boiler room of the hospital, save and except the assistant chief engineer and persons above the rank of assistant chief engineers" (7 employees in unit)

Number of names of persons on revised voters' list		7
Number of persons who cast ballots	6	
Number of ballots marked in favour of applicant		1
Number of ballots marked in favour of intervener		5

**2339-87-R:** United Steelworkers of America (Applicant) v. Viking-Cives Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Mount Forest, save and except foremen, persons above the rank of foreman, office, clerical and sales staff" (45 employees in unit)

Number of names of persons on revised voters' list		45
Number of persons who cast ballots	41	
Number of ballots marked in favour of applicant		10
Number of ballots marked against applicant		31

### Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

**1260-87-R:** United Steelworkers of America (Applicant) v. Herbie's Drug Warehouse Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent in Mississauga, save and except professional medical staff, registered, graduate and undergraduate nurses, paramedical personnel, office, technical and clerical employees, supervisors, assistant directors, head chef, persons above the rank of supervisor, assistant director and head chef, persons regularly employed for not more than 24 hours per week, students employed during the school

vacation period, and employees in bargaining units for which any trade union held bargaining rights as of November 3, 1986" (162 employees in unit) (*Clarity Notes*)

Number of names of persons on revised voters' list		162
Number of persons who cast ballots	128	
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	128	
Number of segregated ballots cast by persons whose names do not appear on voters' list	3	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		63
Number of ballots marked against applicant		61
Ballots segregated and not counted		3

Unit #2: (see *Bargaining Units Certified Subsequent to a Post-Hearing Vote*)

**2204-87-R:** Sudbury Mine, Mill & Smelter Workers Union, Local 598 (Applicant) v. E & R Jewell Contracting Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Town of Nickel Centre, save and except supervisors, persons above the rank of supervisor, and office and clerical staff" (23 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		23
Number of persons who cast ballots	23	
Number of ballots marked in favour of applicant		11
Number of ballots marked against applicant		12

#### Applications for Certification Withdrawn

**1682-87-R:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Main Knitting Mills of Canada Ltd. (Respondent)

**1934-87-R:** Labourers' International Union of North America, Local 527 (Applicant) v. Mount Royal Concrete Floor (Canada) Ltd., and O'Neill Development Corp. (Respondents)

**2036-87-R:** Labourers' International Union of North America, Local 493 (Applicant) v. Pry-Con Construction Inc. (Respondent)

**2067-87-R:** United Steelworkers of America (Applicant) v. KAO-Didak Industries Ltd. (Respondent)

**2235-87-R:** Canadian Union of Public Employees (Applicant) v. Marriott Corporation (Respondent)

**2257-87-R:** Labourers' International Union of North America, Local 1081 (Applicant) v. Eric Whalley Construction Ltd., and 653474 Ontario Ltd. (Respondents)

**2358-87-R:** United Steelworkers of America (Applicant) v. Mitsubishi Electric Sales Inc. (Mitsubishi Corporate Service Division) (Respondent)

**2391-87-R:** Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. CN Hotels Inc., c.o.b. as L'Hotel (Respondent)

**2409-87-R:** Teamsters Local No. 879, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Niagara Block Inc. (Respondent) v. Group of Employees (Objectors)

**2452-87-R:** Ontario Public School Teachers' Federation (Applicant) v. Simcoe County Board of Education (Respondent) v. Ontario Public Service Employees Union (Intervener)



**2457-87-R:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Willett Foods Inc. (Respondent) v. Group of Employees (Objectors)

**2486-87-R:** London & District Service Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Applicant) v. Energy & Chemical Workers' Union, Local 914 (Respondent) v. Energy & Chemical Workers' Union, Local 848 (Intervener)

**2513-87-R:** Canadian Paperworkers' Union (Applicant) v. Grant Waferboard (Respondent)

**2558-87-R:** United Steelworkers of America (Applicant) v. Guillevin International Inc. (Respondent)

**2560-87-R:** United Food & Commercial Workers International Union (Applicant) v. Sarnia Beverages (Respondent)

**2673-87-R:** Labourers' International Union of North America, Local 506 (Applicant) v. Tasis Contracting Ltd. (Respondent)

**2763-87-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. IPCF Construction, division of IPCF Properties Inc. (Respondent)

## APPLICATIONS FOR FIRST CONTRACT ARBITRATION

**2007-87-FC:** Teamsters Local No. 419, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Crane Canada Inc. (Respondent) (*Granted*)

**2561-87-FC:** United Food & Commercial Workers International Union, Local 175 (Applicant) v. 537670 Ontario Ltd., c.o.b. as Journey's End Motels (Respondent) (*Withdrawn*)

**2639-87-FC:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Nickey Holdings Ltd., and Maddalena Holdings Ltd., c.o.b. as Artistic Railings (Respondent) (*Granted*)

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**1023-84-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Montemar Construction Ltd., and 529126 Ontario Inc., c.o.b. as Trimar Construction (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 1190 (Intervener) (*Withdrawn*)

**1680-87-R:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 552 (Applicant) v. A. Ross Plumbing Co. Ltd., and Stephen Ross c.o.b. as Ross Mechanical Systems (Respondents) (*Withdrawn*)

## SALE OF A BUSINESS

**1680-87-R:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 552 (Applicant) v. A. Ross Plumbing Co. Ltd., and Stephen Ross c.o.b. as Ross Mechanical Systems (Respondents) (*Withdrawn*)

## UNION SUCCESSOR RIGHTS

**1223-87-R; 1223-87-R:** United Food & Commercial Workers International Union, Local 382W (Applicant) v. Bay Beverages Ltd. (Respondent) (*Granted*)

**1494-87-R; 1495-87-R:** United Food & Commercial Workers International Union, Local 530W (Applicant) v. Simpsons Ltd. (Respondent) (*Granted*)

**1501-87-R:** United Food & Commercial Workers International Union, Local 500W (Applicant) v. Cathcart Truck Lines (Toronto) Ltd. (Respondent) (*Granted*)

**1505-87-R:** United Food & Commercial Workers International Union, Local 381W (Applicant) v. Coca-Cola Ltd. (Respondent) (*Granted*)

**1511-87-R:** United Food & Commercial Workers International Union, Local 380W (Applicant) v. Alliance Canners Ltd., Metropolitan Toronto (Respondent) (*Granted*)

**1514-87-R:** United Food & Commercial Workers International Union, Local 278W (Applicant) v. Les Aliements Dainty Foods Inc. (Respondent) (*Granted*)

**1515-87-R:** United Food & Commercial Workers International Union, Local 278W (Applicant) v. Crush Bottling Ltd. (Respondent) (*Granted*)

**1516-87-R:** United Food & Commercial Workers International Union, Local 386W (Applicant) v. Hostess Food Products Ltd. (Respondent) (*Granted*)

**1522-87-R:** United Food & Commercial Workers International Union, Local 387W (Applicant) v. 156646 Canada Ltd. (Respondent) (*Granted*)

**1524-87-R:** United Food & Commercial Workers International Union, Local 523W (Applicant) v. Goderich Elevators Ltd. (Respondent) (*Granted*)

**1526-87-R; 1527-87-R:** Soft Drink Workers Joint Local Executive Board of Ontario, representing local unions of the United Food & Commercial Workers International Union, Local 386W (Applicant) v. Thames Valley Beverages Ltd. (Hamilton) (Respondent) (*Granted*)

**1532-87-R:** United Food & Commercial Workers International Union, Local 383W (Applicant) v. Coca-Cola Ltd. (Respondent) (*Granted*)

**1535-87-R:** United Food & Commercial Workers International Union, Local 278W (Applicant) v. Maedel's Beverages Ltd. (Respondent) (*Granted*)

**1536-87-R:** United Food & Commercial Workers International Union, Local 384W (Applicant) v. Coca-Cola Ltd. (Respondent) (*Granted*)

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**3538-86-R:** Rita Haley (Applicant) v. Hotel, Restaurant & Cafeteria Employees Union, Local 75 (Respondent) v. Rose Merlo (Intervener #1) v. Westfort Hotels Ltd. (Intervener #2) (*Granted*)

Unit: "all bartending persons and beverage service persons working in the beverage rooms in the City of Thunder Bay, excluding only one employee having supervisory duties as Bar Manager/Manageress on behalf of the employer" (5 employees in unit)

Number of names of persons on list as originally prepared by employer	5
Number of names of persons on revised voters' list	3
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	3

**1790-87-R:** Brian L. DeLong and Gerald P. Reade (Applicants) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Respondent) (*Granted*)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3

Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	2

**1862-87-R:** Keven Heubner (Applicant) v. Service Employees International Union, Local 204 (Respondent) v. Donald Petras (Imperial Courier) (Intervener) v. Group of Employees (Objectors) (*Granted*)

Unit: "all owner-operators of Loomis Messenger Service in Metropolitan Toronto, save and except sales staff, office staff, warehouse staff, tracers, dispatchers, supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (39 employees in unit)

Number of names of persons on revised voters' list	39
Number of persons who cast ballots	22
Number of ballots marked in favour of respondent	10
Number of ballots marked against respondent	12

**2061-87-R:** Denis Benson (Applicant) v. Teamsters Local No. 91, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. Maurice Lamoureux Lt e (Intervener) ( 14 employees in unit) (*Granted*)

**2317-87-R:** Kathy Geldart (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC, Local 1000 (Respondent) v. The Bay (Intervener) (2 employees in unit) (*Granted*)

**2331-87-R:** Fulltime Housekeeping Staff of Journey's End Motels, Kanata (Applicant) v. Hotels, Clubs, Restaurants Employees' Union, Local 261 (Respondent) v. 547691 Ontario Ltd., c.o.b. as Journey's End Motels Kanata (Ontario) (Intervener) (*Dismissed*)

**2395-87-R:** Bonnie Campbell (Applicant) v. Christian Labour Association of Canada (Respondent) v. Peter Nursing Home Ltd., c.o.b. as Village Haven Rest Home (Intervener) (*Dismissed*)

**2474-87-R:** Rheta L. Webb (Applicant) v. United Food & Commercial Workers International Union, Local 1000A (Respondent) (*Dismissed*)

**2580-87-R:** Debbie Anne Hossack (Applicant) v. Canadian Auto Workers Union, Local 222 (Respondent) (12 employees in unit) (*Granted*)

## MINISTERIAL REFERENCE (DESIGNATION BY MINISTER)

**0284-87-M:** Lumber & Sawmill Workers' Union, Local 2693 of United Brotherhood of Carpenters & Joiners of America, and Labourers' International Union of North America, Ontario Provincial District Council, and Labourers' International Union of North America, Local 607, and United Brotherhood of Carpenters & Joiners of America, Ontario Provincial District Council, and Ontario Provincial Conference of Bricklayers & Allied Craftsmen, and International Union of Operating Engineers, Local 793, and The Ontario General Contractors Association, and Construction Association of Thunder Bay Inc.

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

**2573-87-U:** McGregor Industries Inc., c.o.b. as McGregor Hosiery Mills (Applicant) v. Canadian Textile & Chemical Union, Laurell Ritchie, and Regina Martins (Respondents) (*Withdrawn*)

**2714-87-R:** G. A. Kelson Company Ltd. (Applicant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46, and Bill Weatherup (Respondents) (*Withdrawn*)



## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**1736-84-U:** Labourers' International Union of North America, Local 183 (Complainant) v. United Brotherhood of Carpenters & Joiners of America, Local 1190, 529126 Ontario Inc., c.o.b. as Trimar Construction, and Montemar Construction Ltd. (Respondents) (*Withdrawn*)

**2326-84-U:** Joseph E. Habib (Complainant) v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, U.A.W., Local 1973, and General Motors of Canada Limited (Respondents) (*Dismissed*)

**2556-85-U:** Pierino Gallo (Member UAW Local 195) (Complainant) v. National Auto Radiator Manufacturing Company Limited & The International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, U.A.W., Local 195 (Respondent) (*Dismissed*)

**0104-86-U:** Gulshan Rahim (Complainant) v. Consumers Distributing Company Ltd. (Respondent) v. Teamsters, Local Union 419 (Intervener) (*Dismissed*)

**0999-86-U:** Ghiansaroop Persaud (Complainant) v. Consumers' Distributing Company Limited, Teamsters' Local Union 419 and Sean Floyd (Respondents) (*Granted*)

**1621-86-U:** Joseph Olsiak (Complainant) v. United Steel Workers of America Local 6200 (Respondent) v. Inco Limited (Intervener) (*Withdrawn*)

**1623-86-U:** Toronto Typographical Union, Local 91 (Complainant) v. Burlington Northern Air Freight (Canada) Ltd. (Respondent) (*Withdrawn*)

**0077-87-U; 0540-87-U:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. 459142 Ontario Limited, c.o.b. as Spooner's Restaurant (Respondent) (*Withdrawn*)

**0285-87-U:** Marlene Madensky (Complainant) v. United Electrical, Radio & Machine Workers of Canada (UE) (Respondent) (*Withdrawn*)

**0388-87-U:** Energy & Chemical Workers Union, Local 9670 (Complainant) v. Servico Limited (Petro-Canada) (Respondent) (*Withdrawn*)

**0424-87-U:** Energy & Chemical Workers Union (Complainant) v. MIS Canada Ltd. (Respondent) (*Withdrawn*)

**0433-87-U:** Union of Bank Employees (Complainant) v. National Trust, A National Victoria & Grey Trustco Company (Respondent) (*Dismissed*)

**0461-87-U:** Effie Wagner (Complainant) v. United Electrical, Radio & Machine Workers of Canada (UE) (Respondent) (*Withdrawn*)

**0498-87-U:** United Food & Commercial Workers International Union, Local 175 (Complainant) v. Corporation of the Township of East Ferris (Respondent) (*Withdrawn*)

**0542-87-U:** Energy & Chemical Workers Union (Complainant) v. MIS Canada Ltd. (Respondent) (*Withdrawn*)

**0543-87-U:** Energy & Chemical Workers Union (Complainant) v. MIS Canada Ltd. (Respondent) (*Withdrawn*)

**0712-87-U:** Great Lakes Fishermen & Allied Workers' Union (Complainant) v. A. Figliomeni & Sons Limited (Respondent) (*Withdrawn*)

**0827-87-U:** Daniel Egan (Complainant) v. Energy & Chemical Workers Union, Local 795 (Respondent) v. ICG Utilities (Ontario) Ltd. (Intervener) (*Dismissed*)

**0911-87-U:** Canadian Paperworkers Union (Complainant) v. DRG Inc. (Respondent) (*Withdrawn*)

**0960-87-U:** International Brotherhood of Electrical Workers, Local 1569 (Complainant) v. The Hydro-Electric Commission of the City of Ottawa (Respondent) (*Withdrawn*)

**0992-87-U:** United Steelworkers of America (Complainant) v. Alpa Lumber Inc. (Respondent) (*Withdrawn*)

**1289-87-U:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. 598537 Ontario Inc., c.o.b. as Warner Pro Hardware (Respondent) (*Withdrawn*)

**1476-87-U:** Jerry Letourneau, et. al. (Complainant) v. International Brotherhood of Painters & Allied Trades, Local 1832, and Ontario Hydro (Respondents) v. The Electrical Power Systems Construction Association (Intervener) (*Withdrawn*)

**1571-87-U:** Donald Earl Hickey (Complainant) v. Teamsters Union, Local 230 (Respondent) v. Ontario Hydro (Intervener #1) v. The Electrical Power Systems Construction Association (Intervener #2) (*Dismissed*)

**1605-87-U:** Romeo Linteau (Complainant) v. Labourers' International Union of North America, Local 607 (Respondent) (*Withdrawn*)

**1606-87-U:** Group of Employees of Kenmar Doors Ltd. (Complainant) v. United Brotherhood of Carpenters & Joiners of America, Local 1030 (Respondents) (*Withdrawn*)

**1609-87-U:** Edward J. Pottery (Complainant) v. Harris Rebar Inc. (Respondent) (*Withdrawn*)

**1651-87-U:** Service Employees Union, Local 210 (Complainant) v. University Park Place, division of P.J. Woods Group Inc., Paul Woods, John Woods & Isobel Woods (Respondents) (*Withdrawn*)

**1652-87-U:** Service Employees' Union, Local 210 (Complainant) v. Gateway Haven Home for the Aged (Respondent) (*Withdrawn*)

**1678-87-U:** Egidio G. Masci (Complainant) v. Metropolitan Toronto Civic Employees Union, Local 43 (Respondent) v. Municipality of Metropolitan Toronto (Intervener) (*Dismissed*)

**1683-87-U; 1760-87-U:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Main Knitting Mills of Canada Ltd. (Respondent) (*Withdrawn*)

**1712-87-U:** Employees of Saan Store #52, Fort Frances, (Complainant) v. United Food & Commercial Workers Union, Local 175 (Respondent) (*Withdrawn*)

**1751-87-U:** Energy & Chemical Workers Union (Complainant) v. Southern Wood Products Limited (Respondent) (*Withdrawn*)

**1764-87-U:** International Woodworkers of America (Complainant) v. Kopka Transport Inc., Atway Transport Inc., and Ken Buchanan (Respondents) (*Withdrawn*)

**1808-87-U:** Energy & Chemical Workers Union, Local 58 (Complainant) v. Pennwalt Inc. (Lucidol Division) (Respondent) (*Withdrawn*)

**1875-87-U:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Main Knitting Mills of Canada Ltd. (Respondent) (*Withdrawn*)

- 1919-87-U:** United Food & Commercial Workers Union Local Union 175 (Complainant) v. H.W. Gluck Limited, c.o.b. as Keswick I.G.A. (Respondent) (*Withdrawn*)
- 1999-87-U:** James A. Peters (Complainant) v. Canadian Auto Workers Staff Union (Respondent) v. CAW-Canada (Intervener) (*Withdrawn*)
- 2017-87-U:** Ottawa Newspaper Guild (Complainant) v. The Ottawa Citizen, division of Southam Inc. (Respondent) (*Withdrawn*)
- 2048-87-U:** Mr. Hans G. Derner (Complainant) v. United Steel Workers of America, Local 6500 (Respondent) v. Inco Limited (Intervener) (*Withdrawn*)
- 2068-87-U:** United Steelworkers of America (Complainant) v. KAO-Didak Industries Ltd. (Respondent) (*Withdrawn*)
- 2114-87-U:** Energy & Chemical Workers Union (Complainant) v. Compound Dispensers Inc., and Baron Colour Concentrates (Respondent) (*Withdrawn*)
- 2171-87-U:** Amalgamated Transit Union, Local 1573 (Complainant) v. The Corporation of The City of Brampton (Transit Division) (Respondent) (*Withdrawn*)
- 2284-87-U:** Gordon H. Klein (Complainant) v. Canadian Union of Public Employees (National Div.) & its Chartered C.U.P.E. Local #793 (University of Waterloo) (Respondent) (*Withdrawn*)
- 2292-87-U:** D. Callaghan (Complainant) v. International Alliance of Theatrical State Employees & Moving Picture Machine Operators of the United States & Canada [I.A.T.S.E.], Local 173 (Respondent) (*Withdrawn*)
- 2306-87-U:** Service Employees Union, Local 210 (Complainant) v. Essex Automobile Club & David Butler (Respondent) (*Withdrawn*)
- 2311-87-U:** Beckers Milk (Complainant) v. Milk & Bread Drivers Union Local 647, and Cryril Scoon (Respondents) (*Withdrawn*)
- 2326-87-U:** United Steelworkers of America (Complainant) v. Rowika Industries Limited (Respondent) (*Granted*)
- 2343-87-U:** Canadian Union of Public Employees (Complainant) v. Wm. W. Creighton Centre (Respondent) (*Withdrawn*)
- 2379-87-U:** Energy & Chemical Workers Union (Complainant) v. Canadian Plastics Concentrates (Respondent) (*Withdrawn*)
- 2380-87-U:** Frederick R. Winkworth (Complainant) v. Irene A. Scully (Respondent) (*Withdrawn*)
- 2392-87-U:** Southern Ontario Newspaper Guild, Local 87 (Complainant) v. Metroland Printing, Publishing & Distributing, division of Harlequin Enterprises Ltd. (Respondent) (*Withdrawn*)
- 2396-87-U:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC, Local 414 (Complainant) v. Wallaceburg IGA, Ms. W.A. Spadafore, Mr. L. Spadafore, Ms. L. Spadafore, and Ms. A. Furtah (Respondents) (*Withdrawn*)
- 2397-87-U:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Main Knitting Mills of Canada, and Mr. Greenstein (Respondents) (*Withdrawn*)
- 2400-87-U:** International Brotherhood of Electrical Workers, Local 636 (Complainant) v. Hydro Electric Commission of the Town of Markham (Respondent) (*Withdrawn*)



**2403-87-U:** Michael Bruce Hamilton, Shop Steward (Complainant) v. C.U.P.E. Local 79, Bernard O'Leary, Assistant Superintendent, Seaton House, and the Corporation of Metropolitan Toronto (Respondents) (*Withdrawn*)

**2411-87-U:** Joanne Poitras (Complainant) v. Modern Building Cleaning Services of Canada Ltd., Canada Post Corporation, and Richard Porlier (Respondents) (*Withdrawn*)

**2420-87-U:** Paul White (Complainant) v. The Canadian Paper Makers Union Local 84 (Respondent) (*Withdrawn*)

**2445-87-U:** Stephen Sura (Canada) Ltd. (Complainant) v. Labourers' International Union of North America (Respondent) (*Dismissed*)

**2458-87-U:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Willett Foods Inc. (Respondent) (*Withdrawn*)

**2487-87-U:** Canadian Union of Public Employees (Complainant) v. Ferncliff Day Care & After School Group (Respondent) (*Withdrawn*)

**2527-87-U:** Labourers' International Union of North America, Local 183 (Complainant) v. Eagle Stone Ltd. (Respondent) (*Withdrawn*)

**2555-87-U:** Canadian Union of Public Employees (Complainant) v. Corporation of the Town of Mount Forest (Respondent) (*Withdrawn*)

**2556-87-U:** Canadian Textile & Chemical Union, Local 590 (Complainant) v. McGregor Industries Inc., c.o.b. as McGregor Hosiery Mills (Respondent) (*Withdrawn*)

**2574-87-U:** McGregor Industries Inc., c.o.b. as McGregor Hosiery Mills (Complainant) v. Canadian Textile & Chemical Union, Laurell Ritchie, Regina Martins (Respondents) (*Withdrawn*)

**2592-87-U:** United Brotherhood of Carpenters & Joiners of America, General Workers' Union, Local 1030 (Complainant) v. Kenmar Doors Ltd., and Mr. Kenneth Collins (Respondents) (*Withdrawn*)

**2675-87-U:** United Food & Commercial Workers Union, Local 175 (Complainant) v. Harley's Supermarket (1962) Ltd. (Respondent) (*Withdrawn*)

**2688-87-U:** Paul L. Sullivan (Complainant) v. Canadian Convention & Show Services (Respondent) (*Dismissed*)

**2701-87-U:** Dale Parsons (Complainant) v. Victory Soya Mills (Respondent) (*Granted*)

**2702-87-U:** Emmanuel Micallef (Complainant) v. U.F.C.W., Local 114P (Respondent) (*Withdrawn*)

**2864-87-U:** Stephen Hanvey, et. al. (Complainant) v. National Grocers (Respondent) (*Dismissed*)

**2877-87-U:** Mrs. Stella Golocevac (Complainant) v. Jerome Clark, and General Motors Trim Plant (Respondents) (*Dismissed*)

## **APPLICATIONS FOR EARLY TERMINATION OF COLLECTIVE AGREEMENT**

**2383-87-M:** Ella Skinner Uniforms Ltd. (Employer) and Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

## JURISDICTIONAL DISPUTES

**1927-86-JD:** Eastern Construction Co. Ltd. (Complainant) v. International Union of Operating Engineers, Local 793, and Labourers' International Union of North America, Ontario Provincial District Council (Respondents) (*Withdrawn*)

**1928-86-JD:** Janin Building & Civil Works (1983) Ltd. (Complainant) v. International Union of Operating Engineers, Local 793, and Labourers' International Union of North America, Ontario Provincial District Council (Respondents) (*Withdrawn*)

**1780-86-JD:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 67 (Complainant) v. Jaddco Anderson Ltd., and International Brotherhood of Boilermakers, Local 128 (Respondent) (*Withdrawn*)

## APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

**2619-86-M:** Kimberly Clark of Canada Ltd. (Applicant) v. Lumber & Sawmill Workers' Union, Local 2693, of the United Brotherhood of Carpenters & Joiners of America (Respondent) (*Dismissed*)

**2188-87-M:** Service Employees' Union, Local 210 (Applicant) v. Saugeen Memorial Hospital (Respondent) (*Dismissed*)

**2190-87-M:** Aluminum, Brick & Glass Workers' International Union, AFL:CIO:CLC (Applicant) v. Libbey St. Clair Inc. (Respondent) (*Withdrawn*)

## COMPLAINTS UNDER THE OCCUPATIONAL HEALTH & SAFETY ACT

**0650-86-OH:** Ralph Gratton Jr., member of CPU Local 306 (Complainant) v. Boise Cascade Canada Ltd. (Respondent) v. CPU Local 306 (Intervener) (*Dismissed*)

**1949-86-OH:** Douglas Lloyd (Complainant) v. The Crown in Right of Ontario (Ministry of Community & Social Services) (Respondent) (*Dismissed*)

**0818-87-OH:** International Association of Machinists & Aerospace Workers, Frontier Lodge No. 171 (Complainant) v. Fleet Industries, division of Fleet Aerospace Corp. (Respondent) (*Withdrawn*)

**1752-87-OH:** Energy & Chemical Workers Union (Complainant) v. Southern Wood Products Ltd. (Respondent) (*Withdrawn*)

**2504-87-OH:** Roland M. Cecile (Complainant) v. Sandco Automotive (Respondent) (*Withdrawn*)

## CONSTRUCTION INDUSTRY GRIEVANCES

**0017-86-M:** International Union of Operating Engineers, Local 793 (Applicant) v. Eastern Construction Co. Ltd. (Respondent) (*Withdrawn*)

**1202-86-M:** Canadian Union of Operating Engineers & General Workers, Local 793 (Applicant) v. Janin Building & Civil Works (1983) Ltd. (Respondent) (*Withdrawn*)

**2904-86-M:** Ontario Allied Construction Trades Council and its affiliate, Canadian Union of Operating Engineers & General Workers, Local 793 (Applicants) v. Electrical Power Systems Contractors Association of Ontario Hydro, Darlington Generating Station (Respondent) (*Dismissed*)

**3077-86-M:** International Brotherhood of Painters & Allied Trades, Local 205, and Ontario Council of the

International Brotherhood of Painters & Allied Trades (Applicants) v. John Kenyon Ltd. (Respondent) (*Withdrawn*)

**1384-87-G:** Labourers' International Union of North America, Local 506 (Applicant) v. Roy Abraham Construction (Respondent) (*Withdrawn*)

**1833-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. P. A. Richens Carpentry (Respondent) (*Withdrawn*)

**1877-87-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Applicant) v. Moore Industrial Installations (Respondent) (*Granted*)

**1949-87-G; 1950-87-G:** Runnymede Development Corp. Ltd. (Applicant) v. International Union of Operating Engineers, Local 793, and John Ricciuto (Respondents) (*Withdrawn*)

**2179-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Gamen Paving Ltd. (Respondent) (*Withdrawn*)

**2200-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Nimel Construction (Respondent) (*Withdrawn*)

**2224-87-G:** Electrical Power Systems Construction Association (Applicant) v. Ontario Allied Construction Trades Council, International Union of Operating Engineers, and Kenneth Hicks (Respondents) (*Withdrawn*)

**2287-87-G:** Canadian Union of Operating Engineers & General Workers, Local 293 (Applicant) v. Gordon Mulligan Construction Ltd. (Respondent) (*Withdrawn*)

**2295-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. George Winston Design Inc. (Respondent) (*Dismissed*)

**2296-87-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 552 (Applicant) v. A. Ross Plumbing Co. Ltd., and Ross Mechanical Systems (Respondents) (*Withdrawn*)

**2410-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Metro Railing Ltd. (Respondent) (*Withdrawn*)

**2416-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Pachino Construction Co. Ltd. (Respondent) (*Withdrawn*)

**2417-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Aberdeen Highlands Construction Ltd. (Respondent) (*Withdrawn*)

**2431-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Serrentino Equipment Inc. (Respondent) (*Withdrawn*)

**2437-87-G:** Canadian Union of Operating Engineers & General Workers, Local 793 (Applicant) v. Cecil Shaver Ltd. (Respondent) (*Withdrawn*)

**2447-87-G:** International Union of Elevator Constructors, Local 50 (Applicant) v. Canadian Escalator & Elevator Service Co. Ltd. (Respondent) (*Granted*)

**2465-87-G:** Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Ben Plastering Ltd., c.o.b. as Belmont Plastering (Respondent) (*Withdrawn*)



- 2489-87-G:** Labourers' International Union of North America, Local 527 (Applicant) v. Vanis Masonry Construction (Respondent) (*Withdrawn*)
- 2493-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Silver Carpentry Ltd. (Respondent) (*Withdrawn*)
- 2494-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. P. Cipriano Construction Ltd. (Respondent) (*Withdrawn*)
- 2495-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Bayview Sod & Nursery Co. Ltd. (Respondent) (*Withdrawn*)
- 2496-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Petermar Carpentry Ltd. (Respondent) (*Withdrawn*)
- 2497-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Sirro Brothers Cement Finishing & Spray (Respondent) (*Withdrawn*)
- 2498-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Pit-On Construction Co. Ltd. (Respondent) (*Withdrawn*)
- 2506-87-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 700 (Applicant) v. Wrought Iron Products Ltd. (Respondent) (*Granted*)
- 2507-87-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 700 (Applicant) v. AGIP Structural Steel Ltd. (Respondent) (*Granted*)
- 2508-87-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 700 (Applicant) v. Anese Steel Fabricators Ltd. (Respondents) (*Granted*)
- 2514-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Man Construction (Respondent) (*Withdrawn*)
- 2515-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Construction 2000 (Respondent) (*Withdrawn*)
- 2517-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. D.O.V.V. Construction (Respondent) (*Withdrawn*)
- 2519-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. All Star Carpentry Contractors Ltd. (Respondent) (*Withdrawn*)
- 2522-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Control Construction Ltd. (Respondent) (*Withdrawn*)
- 2552-87-G:** Labourers' International Union of North America, Local 1059 (Applicant) v. Horne's Concrete Works Ltd. (Respondent) (*Granted*)
- 2567-87-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 759 (Applicant) v. Intercity Welding & Fabricating (Thunder Bay) Inc. (Respondent) (*Granted*)
- 2581-87-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 67 (Applicant) v. Hi-Grade Welding Co. Ltd. (Respondent) (*Granted*)
- 2584-87-G:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Applicant) v. PCL Industrial Constructors Inc. (Respondent) (*Granted*)

**2585-87-G:** Ontario Allied Construction Trades Council, and its affiliate Canadian Union of Operating Engineers & General Workers, Local 793 (Applicants) v. Electrical Power Systems Contractors Association of Ontario Hydro, Darlington Generating Station (Respondent) (*Withdrawn*)

**2588-87-G:** Labourers' International Union of North America, Local 1059 (Applicant) v. Bectar Corporation (Respondent) (*Withdrawn*)

**2594-87-G:** Canadian Union of Operating Engineers & General Workers, Local 793 (Applicant) v. George Wimpey Canada Ltd. (Respondent) (*Withdrawn*)

**2613-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Bottega Carpentry (Respondent) (*Granted*)

**2624-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. 114585 Canada Lt e (Respondent) (*Granted*)

**2625-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Knoll Office Inc. (Respondent) (*Withdrawn*)

**2626-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. McCartney Installations (Respondent) (*Withdrawn*)

**2627-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Agrigento Group, division of 672259 Ont. Ltd. (Respondent) (*Dismissed*)

**2628-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Diversified Store Fixtures (Respondent) (*Withdrawn*)

**2630-87-G:** Carpenters' District Council of Toronto & Vicinity, United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. L I S Construction Ltd. (Respondent) (*Withdrawn*)

**2647-87-G:** Ontario Sheet Metal Workers' Conference (Applicant) v. Ontario Hydro Electrical Power Systems Construction Association (Respondent) (*Withdrawn*)

**2654-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Kecman Enterprises Inc. (Respondent) (*Granted*)

**2656-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. H.G. Susgin Construction (Respondent) (*Granted*)

**2657-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. Traugott Construction (Respondent) (*Granted*)

**2664-87-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787 (Applicant) v. Rothmar Manufacturing Corp. (Respondent) (*Withdrawn*)

**2670-87-G:** Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, Local 7 (Applicant) v. Level Masonry (Respondent) (*Granted*)

**2717-87-G:** Drywall, Acoustic, Lathing & Insulation, Local 675 of United Brotherhood of Carpenters & Joiners of America (Applicant) v. Belmont Plastering Ltd., c.o.b. as Belmont Plastering (Respondent) (*Withdrawn*)

**2727-87-G:** Carpenters' District Council of Toronto & Vicinity, United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Clinton Carpentry (Respondent) (*Withdrawn*)

**2728-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. 615654 Ontario Ltd. (Respondent) (*Withdrawn*)

**2731-87-G:** Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Alstate Drywall Systems Ltd. (Respondent) (*Withdrawn*)

**2732-87-G:** Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Brunswick Drywall (Ontario) Ltd. (Respondent) (*Withdrawn*)

**2733-87-G:** Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Care Dry-Wall Engineering (Respondent) (*Withdrawn*)

**2734-87-G; 2735-87-G:** Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Nap Mon Construction Ltd. (Respondent) (*Granted*)

**2750-87-G:** International Brotherhood of Painters & Allied Trades, Local 1824 (Applicant) v. C & D Ltd. (Respondent) (*Granted*)

**2755-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. Paul Martin Inc. (Respondent) (*Granted*)

**2769-87-G:** Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, Local 7 Canada (Applicant) v. Joe Arban Contractor Ltd. (Respondent) (*Granted*)

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*Ontario Labour Relations Board,  
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Toronto, Ontario  
M7A 1V4*

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# ONTARIO LABOUR RELATIONS BOARD REPORTS

March 1988



Ontario



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**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1988] OLRB REP. MARCH**

**EDITOR: COLLEEN EDWARDS**

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**1489-84-R; 1490-84-R; 1491-84-R; 1492-84-R; 1549-84-R** Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. McDonnell-Ronald Limousine Service Limited, operating as **Airline Limousine**, Respondent; Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. Aéroport Limousine Services Ltd. and McIntosh Limousine Services Ltd., Respondents; Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. Airlift Limousine Service Limited, Respondent; Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. Air Cab Limousine Services (1985) Ltd., Respondent v. Group of Employees, Objectors; Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. Airlift Limousine Service Limited, Respondent

**Bargaining Unit - Certification - Dependent Contractor - Union seeking to represent drivers of airline limousines - Broker-drivers, lessee drivers and drivers found to be dependent contractors - Livery service drivers excluded from dependent contractor unit - Board applying 30/30 rule - Availability to work within that period resulting in placement on employee list**

**BEFORE:** *R. O. MacDowell*, Alternate Chair, and Board Members *J. Rundle* and *J. Sarra*.

**APPEARANCES:** *Frank J. Luce* for the applicant; *Edward Johnson* for the respondents; *Louise E. Cherevaty* and *Marion F. Cherevaty* for the objectors.

**DECISION OF THE BOARD;** March 9, 1988

1. Having regard to the representations of the parties in Board File 1492-84-R, the name of the respondent employer is hereby amended to "Air Cab Limousine Services (1985) Ltd.". In Board Files 1491-84-R and 1549-84-R the name of the respondent, in each case, is "Airlift Limousine Services Limited".

# I

2. These are several applications for certification which raise similar issues. In each case, the union seeks to represent the drivers of the airline limousines which carry passengers to and from Toronto International Airport. The union proposes broadly-based bargaining units consisting of both drivers and owner-operators, working "under the banner" of each of the respondent companies. The union asserts that for collective bargaining purposes, these drivers should be treated as "employees" within the meaning of the Act. In the alternative, the union asserts that they are, at the very least, "dependent contractors" of the respondents - whatever their legal status may be at common law or for other legal purposes. The union refers to section 1(1)(h) of the Act which reads as follows:

1.-(1) In this Act,

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- (h) “dependent contractor” means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

3. We should note that these applications are but the most recent of a series of similar cases, in recent years, in which taxi drivers and taxi owner-operators have sought (by and large successfully) to organize themselves for collective bargaining purposes. (See, for example: *Blueline Taxi Co. Limited*, [1979] OLRB Rep. Nov. 1056; *Veteran Taxi*, [1981] OLRB Rep. Feb. 198; *Windsor Airline Limousine Services Limited*, [1981] OLRB Rep. March 398; *Beacon Vanier Taxi (1984) Co. Ltd.*, [1984] OLRB Rep. Dec. 1682.) In the last ten years or so there has been a growing appetite for collective bargaining among drivers and “owner-operators” in this industry - perhaps encouraged by the Legislature’s enactment of section 1(1)(h) of the Act. That, in turn, has required the Board to explore the ambit of that section. We must do so here once again.

4. In the course of these protracted proceedings, the respondents (hereinafter sometimes referred to as “the company”) have taken a variety of alternative positions: that there is no appropriate bargaining unit at all; that the bargaining unit consists of only a small number of bus drivers; that all of the limousine drivers are independent contractors and therefore not entitled to engage in collective bargaining; that some of the limousine drivers are independent contractors, some are dependent contractors, and some are employees; that the drivers, or some of them, are not employees of the respondents at all, but are rather employees of the so-called “brokers” who contract with the limousine companies for the use of one or more operating permits; that if there is to be any bargaining unit at all, it should include all brokers, including multi-permit holders, who do not actually drive but may have the right to do so; and that any bargaining unit should also include certain “livery drivers” who do not fall within the specific regulatory framework of the airport but who, the respondents assert, are drivers and should therefore be included in any broadly described drivers unit. In addition, the respondents initially took the position that they need not produce a list of the individuals potentially affected by these applications, and that the trade union had no right of access to such information, nor any right to a copy of any such list as might be required by the Board. This “hide and seek” approach to litigation was rejected on an earlier decision of the Board, for reasons which need not be repeated here. The accuracy and precise composition of the list, however, is something to which we shall return later.

## II

5. In accordance with its usual practice when there is a dispute with respect to the composition of the bargaining unit, the Board appointed a Labour Relations Officer to conduct an inquiry into that matter and report to the Board. Here that was a massive task, because the status of all but a handful of drivers was in dispute. The parties eventually agreed that the individuals to be examined could be grouped, for analytical purposes, into several categories: “brokers who do not drive”, “brokers who drive”, “lessees who drive”, and “drivers” (we shall explore these categories in more detail below). The respondents’ primary position remains that they are all “independent contractors” and therefore not entitled to engage in collective bargaining under the provisions of



the *Labour Relations Act*. The union's position remains that they are "employees" or alternatively "dependent contractors".

6. The Officer's inquiry consumed quite a number of hearing days, as the parties called evidence from the witnesses which, they agreed, would be representative of the various groups in dispute. Throughout the Officer's inquiry, the parties were afforded a full opportunity to call their witnesses, examine and cross-examine those witnesses, and introduce any evidence which, in their submission, might be relevant to the issues which the Board must resolve. At the conclusion of the Officer's inquiry, the parties were asked if they had any further evidence and/or witnesses that they wished to call, and each party indicated that it did not. The testimony was transcribed, verbatim, and, together with supporting exhibits, was reproduced in an Officer's report of some 1,400 pages.

7. Following the release of the Officer's report, the parties (including the representatives of the objectors) were given the opportunity to make representations as to the conclusions which the Board should reach in view of the evidence contained in it. Counsel for the applicant and the respondents both made lengthy and detailed submissions, which we have found to be very helpful in clarifying the issues which we must determine. We were also supplied with case books containing the legal authorities upon which the parties relied. In their case books the parties included virtually all of the reported decisions of the Board on the "dependent contractor" issue, as well as representative cases from other jurisdictions, and judicial views on the modern meaning of "employment". Again, we have found this survey of the law to be helpful, even though we have not, in these reasons, mentioned each and every case to which counsel referred.

8. Similarly, it is neither necessary, nor practical, to reproduce in these reasons the details of the witnesses' testimony. We shall endeavour to sketch in an overview - a composite picture gleaned from a general assessment of the evidence in its totality. In doing so, we must note that some of the evidence was confusing and contradictory, and no doubt influenced by the witness' own perspective and experience in what is necessarily a situation fraught with ambiguity. As one witness put it:

The whole thing is contradictory out here, right, because in one minute you're an employer according to the eyes of one group, and you're an employee according to the eyes of another group. Somebody should make up their minds what we are, and then tell us and then we'll know...

From one perspective the working drivers consider themselves to be "self-employed", but from another, they are working for their company in circumstances somewhat similar to that of an ordinary employee. This ambiguity is implicit in the notion of the "dependent contractor".

9. There were objections to the evidence of certain witnesses called by the applicant. Counsel for the respondents submitted that it was out of date or was given by someone whose status was in dispute. We are satisfied that the evidence was properly admitted by the Officer, leaving its weight, if any, to be determined by this Board. We have read that evidence. It does not significantly add to or contradict the evidence given by the other witnesses whom the parties agreed were representative. Accordingly it is unnecessary to comment further on this particular issue.

10. Although the representatives of the objectors were extended the opportunity to do so, they did not make formal submissions. Their position, however, seems to parallel that of the respondents.

### III

11. At the time the application was made, the five companies named as respondents were

the sole operators of limousine services at terminals I and II of Pearson International Airport. These services include the prearranged pickup of customers from place of origin (i.e. business or home) and carriage to the airport, as well as carrying customers from the airport to various destinations specified by the customer - primarily in Metropolitan Toronto or the Regional Municipality of Peel or York. The companies' exclusive rights to service the airport are based upon commercial arrangements which they have with Transport Canada.

12. The fares charged for limousine services are set by Transport Canada in conjunction with the respondent companies. The owner-operators and drivers involved in the service delivery system have made representations to Transport Canada from time to time on the appropriate level of fares, but the evidence does not establish whether those representations had much effect. Transport Canada retains the right to prescribe the fare schedule.

13. Fares are structured on a zone system, with payment fixed at rates which depend upon the geographic location of the customer's point of origin or destination. Customers may pay less than the designated zone fare (see below for a discussion of "discounts"), but the limousine driver is strictly prohibited from charging a higher rate, regardless of his own inclination or a customer's willingness to pay. Accordingly, an important aspect of business activity - competitive pricing - is entirely absent from this market. The price paid for the drivers' services remains in the hands of the company and the regulatory agency.

14. At one time, drivers were clearly employees of the respondent limousine companies. Since the 1970's, however, a more complex system of service delivery has evolved. In 1976-77, Transport Canada issued to the five respondent companies 195 operators' permits or "plates" as they are sometimes called. Each vehicle operating out of the airport has a plate which is numbered one to 195, as is the vehicle itself. No vehicle can operate without a Transport Canada plate. By controlling the plates, the companies effectively control their limousine fleet.

15. The plates remain the property of Transport Canada, but for practical purposes are issued to and managed by the respondents. The configuration of plates held then as now is as follows: Airline Limousine Services, 100 plates; McIntosh, 14 plates; Airlift, 21 plates; Air Cab, 30 plates; and Aaroport, 30 plates, respectively. There is no dispute that Aaroport and McIntosh are engaged in related businesses under common control and direction, and should therefore be treated as one employer for the purposes of the Act (see section 1(4) and the discussion below). Although Air Cab shares dispatch services, it is not specifically agreed that it, too, is a related employer for labour relations purposes.

16. The plates issued to the respondent companies are, in turn, "contracted out" to individuals who enter into standard form service agreements. The plate remains in the company's name, but the provision of limousine service becomes the responsibility of the contract holder, commonly referred to as a "broker". Originally the service contracts were purchased directly from the company, but now they are generally purchased from other brokers at market value. In 1976, a person wishing to operate an airline limousine could acquire a contract for about \$18,000.00. The current market value is about \$100,000.00. Contracts may not be transferred from one broker to another without company approval. The company receives a transfer fee of approximately \$750.00 from the purchaser of the contract. If a transfer is approved, the broker receives the benefit of any capital gain arising from the sale.

17. The persons engaged in supplying limousine services are linked together in a complex web of contractual relationships. For ease of exposition, the parties divided the "working drivers" into three broad categories. First, there are the brokers who own the contract (i.e. have a service agreement permitting them to use the company's plate) and drive their own car. These will be



referred to as "broker-drivers". It is acknowledged by all the parties that, currently, all broker-drivers own only one car and one service contract. Alternatively, the broker may enter into a lease arrangement with a driver (hereinafter called a "lessee-driver") who may or may not own his/her own car. A lessee driver is essentially a subcontractor who strikes a deal with the broker for the use of his service contract. Finally, there are "drivers" who do not own either a car or a service contract, but who "rent" various blocks of time from the broker-drivers, lessee-drivers or brokers who own or control the contracts and cars used to provide limousine service in and out of the airport. They too have a kind of lease arrangement, but it may be less regular, formal, or permanent than that of a lessee driver.

18. The Officer's report includes the testimony of nine individuals agreed by the parties to be representative of the persons working in the airport limousine business. It was also agreed that their evidence would apply to each of the five separate certification applications. The witnesses were: David Eluik, a broker who owns four contracts but is not the owner of the cars operating under them; Richard Croke, a broker owning three contracts and the cars which operate under them; Frank Repchik, a single contract owing broker who neither owns a car nor drives under the contract; Hasoon Kheder and Vazken Keramatlian, broker-drivers who own, or (in Keramatlian's case) lease a car, Hadi Abou-Mechrek, a lessee-driver who does not own his own car; Fin Miller, a lessee-driver who does own his own car; and Tom Ingus and Khalil Ajram, who are drivers.

19. We shall first consider the position of the "working drivers" (i.e. broker-driver, lessee-driver, and driver). We will then consider the position of the brokers who do not drive.

#### IV

20. As we have already mentioned, a basic requirement for operating a limousine is the possession or use of a service contract with one of the respondent companies. Those contracts set out in detail the broker's financial and performance obligations. For a monthly fee, the company agrees to provide each limousine with a radio, dispatch service, the use of its name and a fair share of customer calls, and the broker undertakes to ensure that the limousine service is available seven days a week. The agreement can be terminated on 30 days' notice for just cause, or upon the insolvency of the broker, or if the car is off the air on three occasions for five consecutive days.

21. The broker represents that he is an independent contractor and is not or will not hold himself out to be an agent, servant or employee of the company. The broker must operate a vehicle to the company's specifications and bearing the company's name or logo, but, pursuant to Article 6(b) of the service agreement, the broker assumes full risk for liability or damage to all persons and property in connection with the operation of the limousine. There is also a formidable array of indemnification clauses and insurance obligations. The broker must maintain insurance, provide proof of insurance, name the company as an insured party, and cannot cancel his insurance without 30 days' written notice to the company. Thus, despite the representation that the broker is an "independent contractor", the contract draftsman has gone to considerable efforts to ensure that the company will be protected if a court should decide that the broker-drivers are really part of *its* business and that the company would therefore be liable in a civil action. (In this regard see: *Fraser v. U-Need-A-Car Ltd.* (1985) 50 O.R. (2d) 281 (C.A.).)

22. Brokers must have company approval before they drive themselves, and any substitute drivers must be appropriately insured and their names submitted to the company in writing. Those drivers, according to the service agreement, are said to be employees of the broker - although they too must meet the insurance, performance or other requirements prescribed by the company. The service agreement cannot be assigned without the consent of the company, and it cannot be assigned at all to any corporation. It appears therefor, that a broker must contract with the com-



pany in his *personal capacity*. He cannot seek the flexibility, limited liability or possible tax advantages associated with incorporation (nor, of course, can s/he convey effective ownership of the contract by means of a share transfer).

23. The process by which a working driver becomes connected with a particular limousine company is more or less the same for broker-drivers, lessee-drivers and drivers. The individual must first apply directly to the company and be approved by the company before s/he is permitted to drive. The mechanics vary from company to company, but in all cases the individual must fill out an application and there is an interview and approval process. The company reserves the right to check into the individual's provincial driving record and some companies make job-related inquiries into both medical and criminal records. At least one company requires the submission of a photograph and driver abstract. These requirements may be routine or "pro-forma" where the applicant is a relative or friend recommended by an existing broker; however, company approval is an essential prerequisite for working in the company's system - even for those individuals who, it is now argued, are independent contractors or employees engaged by the company's brokers, broker-drivers, or lessee-drivers. In this regard, it is interesting to consider the terms and terminology found in the Drivers' Manual (Exhibit 26 at p. 1232 of the transcript):

*Drivers seeking employment* must comply with the following:

- 1 must be conversant in the English language (written or oral).
- 2 must be a resident of the Toronto area and have been a resident for a minimum of 3 years.
- 3 must be physically fit and supply a medical certificate.
- 4 must pass a Transport Canada test in general knowledge of Metro Toronto and surrounding areas as well as a Company driving test.
- 5 must be of good character.
- 6 must supply two references.
- 7 must have a good driving record and provide proof of same.
- 8 must supply two 2x2 photos as prescribed by Air Cab Limousine.
- 9 Driver training programs prescribed by the Company from time to time are madatory.  
[sic]

Any person meeting the above requirements and accepted as a Driver will be placed on probation for a period of three months.

[emphasis added]

The language is that of "employment"; and the requirements resemble those which one would demand of a prospective employee. Likewise, the 3 month probationary period.

24. Once the company has approved a prospective driver, the individual files these approval papers with Transport Canada as part of a licence application. Transport Canada, in turn, gives a briefing and examination. If successful, the individual receives a licence to drive a limousine.

25. An approved driver must be matched with a broker-driver, lessee-driver, or broker. If the driver has already been recommended by a broker or broker-driver, there will already be a car to which s/he may be attached. This seems to be fairly common because prospective drivers appear

to be acquaintances, friends or relatives of persons who already work in the system. Alternatively, the company can offer an approved driver to an individual in need of a driver and, between them, they decide if it is a good match. Individuals must have company approval and Transport Canada licensing before buying a contract and becoming a broker-driver. According to Hasoon Kheder, a driver who bought a contract and became a "broker-driver", the transition involved no material change in his work pattern, hours of work, uniform, or the company rules under which he operated. He simply had a greater stake in the business and, in his view at least, a greater opportunity for reward. Vazken Keramatlian made the same transition by borrowing from a bank in order to purchase a contract. As he put it: "I would work for myself rather than paying someone else; I would pay the bank and the investment would be mine". Both Kheder and Keramatlian have worked for their respective companies for many years.

26. Training of drivers is fairly minimal and includes an orientation session usually given by the company and/or a general explanation by the broker of the airport operation. Sometimes it includes several hours of observing the dispatch office and/or training films. Rules and regulations are most often communicated by the company manager and by means of a manual of rules and regulations given by the company in the course of the orientation or passed on by the broker. The broker must receive the approval of the company before hiring any substitute driver and before making any lease arrangement with a lessee-driver. If a substitute driver is required to "fill in" (for example, because of illness), the broker or lessee-driver may choose someone from the company's approved list.

27. The revenue (and therefore income) of broker-drivers, lessee-drivers or drivers is derived exclusively from customer fares. In this sense they operate on something of a "piece-rate" system with their net income being determined from fares taken in, after a variety of expenses are paid out. The working drivers in all three categories confirmed that their sole income is derived from driving from their respective companies upon which they depend exclusively for their work opportunities. They do not "free lance", and unlike some independent cab owners they do not cruise the streets for customers who "flag" them down. They do not compete with each other for fares. They cannot serve the customers of other companies unless specifically authorized to do so (a process called "farming out" clients.)

28. In contrast, the "pure brokers" neither supply their labour in the service of customers nor depend upon the fares paid by those customers. The non-driving brokers profit from the astute management of their investment in one or more contract. Lessee drivers and drivers pay them a fee of roughly \$1,000.00 to \$1,200.00 per month for the use of the contract. It appears that the non-driving or multi-contract broker has little contact with the company, and sums owing to the company under the contract are paid directly by the working driver using it.

29. From their revenues (customer fares) the working drivers must cover a variety of ongoing expenses. All drivers, broker-drivers, and lessee-drivers must maintain and pay for three annual licenses: a provincial Ministry of Transportation license, the Transport Canada license to drive an airport limousine, and a license issued by the City of Mississauga. These license fees are the personal responsibility of the individual driver.

30. The company retains ultimate control over the plates, the residual right to terminate or prevent the transfer of a service contract, and a veto over who drives the cars operating under its banner. The company also *requires that all vehicles operating in its system be registered in the company name*. The company, therefore, maintains close control over all of the essential elements permitting the drivers to work, as well as the manner in which that work is performed (see *infra*).

31. The company is paid a monthly fee. These dues range from \$600.00 to \$760.00 per

month and include: payment for brokerage services (i.e. the entitlement to pick up at the airport) dispatch services within the Metropolitan Toronto Area, a rental fee for the two-way radio necessary to receive dispatched calls, the company sign, business cards and receipts under the company name and phone number; and credit privileges. All of the documentation used by the working drivers bears the company's name or logo. From the customer's perspective s/he is contracting with the company for the provision of limousine service and, in all likelihood, those customers will be indifferent as to which working driver provides those services so long as the customer's needs are met in an efficient and courteous manner. The broker-drivers, lessee-drivers, and drivers do not advertise on their own behalf and as we have already noted, are not permitted to solicit business at rates other than those prescribed by Transport Canada. Nor, it seems, are they permitted to make any private arrangements with customers or develop their own clientele since "locking up" such business is prohibited under the terms under which they work. They are clearly serving *the company's customers*, not their own. (Again see: *Fraser v. U-Need-A-Cab Ltd.*, *supra*). Their cars are not used for any other business purpose (except perhaps in the case of the livery service which we will discuss below).

32. The company provides credit privileges to its regular customers in the form of vouchers, bearing the company name. Such vouchers are usually issued at full fare to travel agencies and businesses. The vouchers are given by the customer in lieu of a cash payment. The company reserves the unilateral right to both arrange and cancel such credit arrangements, which must be honoured by the individuals driving under the company banner. Company credit privileges may also permit payment of customer fares by a variety of credit cards such as Visa, Mastercard and American Express - all recorded in the company's name. The working drivers do not have their own independent arrangements with Visa, Mastercharge or American Express (although they may well be entitled to make such private arrangements). They rely on the company in that regard. The company typically deducts from the monthly dues a five to ten per cent service fee for credit card charges, then returns to the driver any net cash amount in cheque form. The working drivers must accept credit cards and company vouchers even though this may mean some delay in payment.

33. Company service vouchers issued to businesses or travel agents may be at "full fare" but, in addition, the company negotiates discount arrangements which the driver of the limousine is also required to honour. For, example, a company may negotiate reduced fares for the crews of particular airlines and the drivers must honour these arrangements even though they involve a ten to thirty-five per cent discount from the stipulated fares with consequent loss of income to the driver. Discounts can also take the form of coupons handed or mailed out by the company. Again, the ten or twenty per cent discount must be honoured by the individual driving the vehicle at the time.

34. Insurance is typically paid through the company's fleet insurance plan but can be obtained individually by a working driver if the coverage meets the company's approval. A number of drivers are in fact covered by the drivers' association's co-operative insurance plan. The company requires coverage for public liability, property damage, fire, theft and collision protection, and in the case of its own insurance plan charges an administration fee.

35. There are ongoing expenses for maintenance of the car, gas, oil, insurance, and daily cleaning of the vehicle. These expenses are typically shared by the working drivers in direct proportion to their "attachment" to the vehicle and the amount of time that they drive. The responsibility for maintenance varies from company to company and relationship to relationship. A "pure driver" will typically pay to a broker or a lessee-driver a daily rental fee of \$95.00 to \$120.00 to cover all expenses except gasoline. Ordinarily each limousine has one individual, usually the les-



see-driver or broker-driver who is responsible for submitting the monthly vouchers/credit charges to the company on behalf of all of the drivers of that particular vehicle.

36. The drivers, broker-drivers and lessee-drivers receive no wages or benefits payable directly from the company. Nor do they receive any vacation or statutory holiday pay. There is no income or revenue guarantee. They cover their own OHIP expenses. There are no attendance records maintained by the company. Drivers, broker-drivers and lessee-drivers arrange their own hours of work subject always to the requirement that the vehicle be available. Each working driver keeps his/her own records of fares, income and expenses.

37. The working drivers may have their own bookkeepers or accountants. They file income tax returns as self-employed individuals and deduct expenses such as gas, maintenance, uniform costs, cleaning costs, and car depreciation where appropriate. When the question is put that way, they uniformly describe themselves to be "self-employed" although when the matter is pursued the picture is not so clear. For example, Abou-Mechrek, a lessee-driver whose brother owns the car (which is still registered in the company's name) indicates both that he has "no boss" and that the company is his "boss". This ambiguity of perception runs through the evidence. We need not multiply the examples.

38. Each driver keeps "run sheets" which identify his trips with a particular customer. The company may also maintain certain dispatch records but they will not necessarily be complete and will not identify the particular driver involved or the revenue which he may have collected. As noted, the fare is set by Transport Canada, and the company is indifferent as to which of its approved drivers delivers the service, so long as the service is provided efficiently.

39. In order to meet the service regimen encompassing 18 hours per day, seven days a week, it is necessary to have two or three drivers available to operate a particular vehicle. Those individuals typically "cover" one another for vacation or sick days. The company is not involved in this scheduling exercise, but will supply an approved driver on request if there is a gap which cannot be filled by the existing drivers' arrangements. Any substitute driver must be authorized to drive for the company. On a rotational basis, the company designates cars that must be on the road as early 3:30 AM to pick up and transport its earliest customers. Similarly, the company designates cars on a rotational basis, to be available after midnight for late arrivals. The working drivers are obliged to meet these requirements.

40. The company substantially controls the work flow upon which the working drivers are totally dependent for their income. The drivers, broker-drivers and lessee-drivers cannot operate a limousine at all without company approval since the company controls the plate which is a necessary prerequisite for operating a limousine at the airport. The company also has considerable (although not total) control over the flow of customers who, as we have already mentioned, are clearly regarded as customers of the company rather than any particular driver. On a day-to-day basis the individual driving comes "on the air" and the company dispatch assigns calls for pick-up. Some cars wait at company designated dispatch zones. The limousine picks up the customer, drives him/her to the requested terminal, then picks up a further customer there.

41. The peak period for delivery from various locations to the airport is 5:45 a.m. to 7:30 a.m. After 7:00 a.m. the platform at the airport opens (i.e. after the first flight arrivals) and limousines begin to line up for fares leaving the airport. Throughout the day the company dispatches cars to pick up passengers, utilizing a two-way radio system to assign the car in the zone nearest the customer's location. If no car is available within the city to fulfill a request the company dispatches the last car to arrive at the airport to return downtown and pick up the fare. Obviously, it is disad-

vantageous for the driver to make the run downtown without a passenger, however they are required to do so.

42. Pick ups at the airport itself are managed in large measure by Transport Canada. The drivers have already paid a "platform fee" to Transport Canada through the company and must be operating under a company plate in order to pick up customers at the airport. After dropping their fares, the limousines line up at the compound and are dispatched to the terminal platform on a first come, first served basis. If a customer requests a particular company because s/he holds a voucher the first car in the company's line-up is put into service. The platform dispatch process involves a Transport Canada commissioner on the platform and one in the vehicle compound.

43. Drivers, broker drivers and lessee-drivers must operate under this established dispatch system. They are strictly prohibited from making their own arrangements with customers. This practice, called "locking up" fares can result in disciplinary action. Drivers cannot drive for another company unless they first go through the approval process of the new company and, for practical purposes, receive the approval of the company that they left. In this regard the language of exhibit 19 is rather revealing. Mr. Maalouf, president of Airline Limousine advises:

"...any driver who has worked for any other limousine company must have a letter from that company stating that he *left their employ* on good terms and that they recommend him as a limousine driver".

Although Mr. Maalouf's current position is that none of the working drivers are employees of their respective companies, his letter (written before the commencement of these proceedings) uses the terminology of "employment". So did the driver's manual to which we have already referred. The use of that language is not accidental. The working drivers do look very much like employees of the companies for which they work.

44. The make of the limousine is regulated by Transport Canada and a vehicle can be kept in service for three years. Thereafter the owner can apply through the company to have Transport Canada extend its use for a further year. The specific make of the cars is negotiated between Transport Canada and the company, but can include all large models, such as Lincolns, Park Avenues, Oldsmobiles etc. The individual company also negotiates a limited range of colours: black, navy blue and grey. The working drivers must abide by these requirements.

45. Each limousine must carry the sign, logo and identification of the company and it must be kept in excellent driving condition. The limousine must be kept clean inside and out, under the rules of both the company and transport Canada. The company regulations specify a list of items which must be kept in the car at all times including flashlight, black umbrella and fire extinguisher. The company rules parallel and supplement those issued by Transport Canada and are directed to the same objective: insuring good service to the public; which in the company's case contributes to its own good will and the likelihood of repeat business.

46. Each driver, broker-driver and lessee-driver must wear the uniform and hat designated by the company. The individuals pay for the uniform themselves either by direct purchase from the company or purchase from a store to which they are directed by company officials. The uniform must be kept clean and the drivers must generally adhere to the company's rules requiring presentable appearance. Company regulations also specify the colour of socks, belts, type of shoes - essentially everything worn by a driver while at work. Some years ago one company changed its policy from blue shirts to white shirts. Its drivers duly complied.

47. Drivers, broker-drivers and lessee-drivers are obligated to abide by the rules and regu-



lations issued by the company from time to time, as well as the licensing requirements of transport Canada. These rules include on-air hours, dues and fees, maintenance of a satisfactory driving record, courtesy to customers, line up regulations (prohibiting line jumping or arranging one's own fares) display of the company sign, use of company receipts etc. Virtually every facet of the day to day operation of the limousine is subject to regulation. There are detailed rules on radio procedure, booking procedures, ethics and driver conduct, automobile condition, monthly and yearly fees and *mandatory attendance at company general meetings*. The company supplies the two-way radios and is responsible for maintenance and repair.

48. The working drivers do not and cannot engage in advertising or promotional activities on their own behalf. They do not have their own personal business cards and may not, in accordance with the company rules, have any fixed relationship with particular customers. They cannot recruit or develop their own clientele. The company undertakes all advertising for the promotion of its limousine services. This includes advertising in the yellow pages, "mail out" advertising to prospective users and company promotional campaigns. The working drivers rely upon these promotional efforts in order to generate good will and therefore a sufficient level of customer demand. As we have already mentioned, company promotional activities can include special arrangements with customers, vouchers, discount fares, or discount coupons, all of which the drivers must accept without question.

49. Each company has its own established disciplinary code. Such discipline can take several forms. There may be verbal reprimands or a written warning by company dispatchers. There can also be monetary penalties in the form of specific fines, or lost income when a car is "put off the air" and not given access to dispatch calls. More serious driver misconduct could lead to a suspension which would prevent the driver from taking any passengers at all. Ultimately, a company could terminate its relationship with a driver altogether by withdrawing its approval to use the company's plate.

50. On a day-to-day basis drivers work in accordance with a complex network of rules set out in the service agreement and a driver's manual, which is said to be part of the service contract, and which the company may change, unilaterally, from time to time. Once again, one finds in the manual language reminiscent or descriptive of an employment relationship. For example, an owner or driver who deliberately holds his microphone open "will be subject to instant dismissal". Any deviation from the tariff renders the offender subject to immediate termination. A driver must notify the dispatcher if he anticipates being as little as one or two minutes late, and may not contact the customer until five minutes before the pick-up time.

51. Driver misconduct is divided into "major" and "minor" infractions. Driving privileges are immediately terminated if a driver is proven to have intentionally overcharged or used drugs or alcohol while on duty. Major infractions include such matters as refusing to accept a short-run fare, booking off location, booking clear with passengers still in the car, "locking up" an order [i.e. making a private customer arrangement], proven customer complaints, or submitting two or more vouchers for the same fare. Such infractions result in twenty-five to fifty dollar fines for the first offence, fifty to a hundred dollars for a second offence, three to ten days suspension for the third offence and termination for a fourth offence. Minor infractions are equally detailed and specific: smoking on the platform without customer approval; improper dress; driving with the radio turned off; failing to maintain a clean personal appearance and haircut to the length which the company considers appropriate; or refusing to take platform orders; being late on pick-up or coming on the air; leaving a car running or unattended on the platform; and going to the compound in the morning without the company dispatcher's approval. Once again there are fines attached to these various misdemeanours.



52. There was considerable evidence about the sorts of infractions which usually trigger a disciplinary response. Most common is the failure by a working driver to be on the air by 5:45 a.m. If the driver is late, s/he is usually penalized by being put off the air until the afternoon of the same day. That deprives the driver of the benefit of customers allocated by the dispatch system, with consequent loss of income. In such circumstances a driver may still be entitled to join the line-up for customers at the airport platform but, as we have already noted, the driver is not permitted to actively solicit work, make his own private arrangements for carriage or "lock up" a fare. Repeated tardiness involves more severe discipline on an escalating scale.

53. Drivers may also be put off the air or fined for failing to wear a hat or the specified uniform, for not having a clean uniform, for having a dirty car, or for arriving late at a customer's residence. Drivers are obliged to accept any fare referred to them unless the customer is clearly drunk. A failure to do so results in discipline. Similarly, a refusal to accept company vouchers or discount coupons is considered a serious violation of the drivers' obligations, and sanctions include fines, being put off the air until the fine is paid, or complete withdrawal of company approval. While the withdrawal of approval does not, in itself, foreclose working for another company, a driver's ability to work at the airport will be seriously impaired because any other limousine company may require a letter of reference from the former company stating that the driver has "left their employ" on good terms and that they recommend him/her (see exhibit 19 referred to above).

54. Transport Canada also has rules and regulations which are enforced through a demerit system. Drivers lose "points" for infractions such as jumping their spot in the line or breaking other platform rules. The accumulation of a sufficient number of demerit points may result in the loss of the license. Transport Canada, too, prohibits private fare arrangements which might undermine its established zone rates. Transport Canada also operates a written customer complaint system, and both entertains and investigates complaints made by customers on forms provided for that purpose.

55. The relationship between broker-drivers, lessee drivers, and drivers varies from case to case but has more of a flavour of partnership than employment, with the "co-adventurers" sharing, to varying degrees, both the costs and the opportunities for reward. For example, in Abou-Mechrek's case, he leases the contract, the car is owned by his brother, and he and a friend drive it and split the costs and rewards on a percentage basis. Initially he was taken on, with another driver, working for his brother and splitting expenses on a 50/50 basis. Vazken Kerametlian, a broker driver who leases his vehicle shares costs with another driver but maintains that he does not employ anyone. Finn Miller, a lessee driver who owns his own car shares costs with a "partner" who participates equally in decisions involving the car. Mr. Miller works three and a half days per week, while the other driver covers the remaining three and a half days. Yazken Kerametlian, a broker-driver, usually works his car four days a week with the remainder being covered by others.

56. Typically, the individuals "working the car" are friends or relatives. The lessee drivers and drivers, in varying degrees, share the costs of running the car which must still be operated in strict accordance with the general rules established by the company. While driving, those rules are the same for all driver categories and expose those drivers to the same sanctions. The drivers work out among themselves how they will meet the seven day week regimen prescribed by transport Canada and the company, and "cover each other" for days off, holidays, sick time, vacations etc. The difference is the degree of financial commitment or stake in the system, with broker-drivers having the most, lessee-drivers in an intermediate range, and drivers having the least. But even "pure drivers" who principally supply only their labour "lease time" and the use of the vehicle for a price, and undertake certain expenses in the expectation that they will generate sufficient revenue to exceed their costs. And, as in the case of Finn Miller (see above), the difference may be one

of form rather than substance. Detailed control of the way in which all drivers work, the customers they carry, and the prices they charge remains with the company under whose banner they operate. According to Khalil Ajram, a driver, discipline is really a matter between the driver and the company - the broker-driver or lessee driver would not usually get involved; moreover, if there was a fare dispute, that would be taken up with the company directly. On the other hand he too feels he could engage a substitute driver if that became necessary (but, of course, only from the company's approved list or with its approval). He felt that he worked for the company, was hired by the car owner, but at the same time was "self-employed".

57. A broker-driver, lessee-driver or driver may come to a parting of the ways for either business reasons or a change in economic circumstances, or because the broker-driver does not think his associate is fulfilling his part of the bargain. Drivers may leave that relationship because they have, themselves, acquired a contract, and therefore a greater stake in the system. Hasoon Kheder, a broker-driver for Aaroport started as a driver, then, for \$50,000.00, acquired a contract and became a broker-driver; but, as we have already mentioned, that apparent change in status did not have much effect on his daily work routine. Termination of the relationship can occur for a variety of reasons, however the termination of that relationship does not have the same effect as disapproval by the company because the separated individual can still work elsewhere within the company system. The evidence from the broker-drivers, lessee-driver, and drivers underlined the ambiguity mentioned above. They did not generally consider that those lower in the financial investment pecking order were employees. Rather, they were *all* self-employed individuals, participating to varying degrees in the work opportunities provided and regulated by the company and Transport Canada.

## V

58. It should be noted again that the brokers or contract holders do not have to drive at all and many do not. Nor is it necessary for a broker to own a vehicle. The service contract may be treated merely as an earning asset or investment. Instead of performing the work themselves, brokers may lease their contract(s) to lessee-drivers, charging monthly payments for the privilege of using their contract(s). This fee then becomes the net income for the broker. The evidence of one non-driving broker indicates that he spends 10 to 25 per cent of his work time on his "limousine business" and considers himself to be a self-employed "franchise operator". According to David Eluik, he has little direct contact with the working drivers using his service contract, and may not even know when substitute drivers are engaged - although the company must be informed about that. He does not monitor the drivers' daily activities, keeps no trip records, and does not engage in any advertising to attract customers. In his opinion, all of the working drivers associated with his contracts are self-employed independent contractors or "subcontractors" of his franchise. He analogized the situation to that of a house, in which the landlord retained title to the property, and his tenants paid rent and utilities.

## VI

59. While this is the first effort by the working drivers to engage in collective action under the auspices of the *Labour Relations Act* it is not the first time that they have engaged in collective action. A voluntary association known as The Independent Limousine Owners and Drivers Association (I.L.O.D.E.) has been in existence since the late 1970's. Its activities have varied in intensity over the years but have included: giving advice, providing representation or forwarding driver grievances to the companies, assisting the pursuit of legal remedies for alleged breach of contract, and organizing an association co-operative fleet insurance program as an alternative to the insurance program provided by the companies.



60. The height of collective activity occurred in the spring of 1982 when differences between the working drivers and the respondents culminated in a form of strike action which effectively blocked the airport for a number of hours. That resulted in the association negotiating with the respondents for the current standard form service agreement, which set the framework for the ongoing relationships between the parties. In addition to the requirements and obligations (described (in part) above), the new agreement provided that increases in dispatching and brokerage fees would not exceed the lesser of 10 per cent or the consumer price index. It also established a Review Board process so that working drivers could appeal in the event that their contract or approval to drive was revoked by their company.

61. The effectiveness and legal authority of the Review Board were a matter of considerable dispute. Likewise there was some dispute about the existence and functioning of an association of the five respondent companies. Those companies appear as the named respondent in a 1979 certificate issued by this Board in respect of a bargaining unit covering dispatchers; but, according to Barbar Maalouf, the general manager of Airline Limousine, no formal association actually exists. He conceded however, that any two owners of the five could sign a cheque for payments for fees such as to Transport Canada for its platform dispatch service and that he is paid for administering these fees for all companies. He said, however, that this is not administered through a "formal association". For our immediate purposes it does not matter. We include this evidence only for completeness.

## VII

62. The role of the "livery service" is rather obscure because there is very little evidence about it. Most of the evidence concerned the airport operation and the status of the working drivers as "independent contractors". We do know that the livery service does not operate within the regulatory framework of the airport. Vehicles can deliver customers to the airport but, apparently, are not allowed to pick up fares at the airport. The service does not operate as part of the "in and out" airport permit system presently in place. The livery service is also available for other uses such as weddings or other business or social events. In addition, the livery service can drive customers from location to location within Metropolitan Toronto in the same manner as any taxi, whereas the airport limousine service is restricted to carrying fares to and from the airport.

63. The testimony did not focus very much on the livery service so we do not know the economic or contractual relationships between drivers who do livery work and the companies. While the evidence is very sketchy, it does appear that the livery service is run as part of Airlift Limousine out of the same office and under the same managerial direction, and further that the drivers who work in the airline system may also work in the "classic livery" operation. We do not know whether they always use the same cars and drivers, the terms under which they work, or the pricing arrangements for livery runs. There is no evidence that the working drivers solicit their own independent livery business. Once again it appears that the customers are acquired and allocated through the company.

## VIII

### Legal Considerations and Conclusions

64. The term "dependent contractor" is of relatively recent origin. It was introduced into Ontario's legal lexicon by Professor Harry Arthurs in 1965 to describe individuals whose economic situation resembles that of an independent entrepreneur in some respects, but, when viewed in its totality, really involves a degree of subordination and economic dependence more closely resembling that of an employee. (See: H. W. Arthurs: *The Dependent Contractor: A Study of the Legal*



*Problems of Countervailing Power* (1965) 16 University of Toronto Law Journal 89.) Then, as now, the distinction between employment and “self-employment” could be legally significant. Important rights, or statutory protections could turn upon the label attached to the particular economic relationship. The designation “employee” led to certain legal results. The designation “independent contractor” led to others. Classification was important. A “contract of service” was considered to be very different from a “contract for services”; and adjudicators therefore struggled to analyze and distinguish the two - all the while recognizing that there was no “litmus test” for deciding the question. The distinction between employment and self-employment is genuinely fluid, and difficult to draw at the margins.

65. In this area of legal ambiguity the Courts have considered a variety of factors, including the so-called “four-fold test” enunciated in *Montreal v. Montreal Locomotive Works Ltd.* [1946] 1 D.L.R. 161, where Lord Wright examined “a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss”, then added:

...In many cases the question can be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior.

Others suggested an “organization test” according to which an individual would be said to be an employee if s/he was really “part and parcel of the [alleged employer’s] organization” (*Bank Voor Handel En Scheepvaart N.V. v. Slatford* [1952] 2 All E.R. 956); or was “integrated into” the business as opposed to being “only accessory to it” (*Stevenson Jordan & Harrison Ltd. v. MacDonald et al.* [1952] 1 T.L.R. 101). [For cases in which Canadian Courts have embraced this “organization test” see, for example: *Cooperators Insurance Association v. Kearney* (1965) 48 D.L.R. (2d) 1 (S.C.C.), and, more recently, *Meyer v. J.P. Conrad Lavigne Ltd.* (1980) 27 O.R. (2d) 129 (O.C.A.). In one of a number of “milk store cases” in the mid-1970’s the Alberta Court of Appeal concluded that an individual store operator may be an employee within the meaning of the relevant labour legislation even though he fixes his own hours of work, engages and discharges his own employees, is not supervised in the manner of carrying out his duties, and runs the risk of loss. The Court suggested that a useful test is whether the operator of the store is in effect carrying on the business on his own behalf or on behalf of a superior. See: *R v. Mac’s Milk Ltd.* (1973) 40 D.L.R. (3d) 714].

66. Very early on, the U.S. National Labour Relations Board emphasized another factor - statutory context - arguing that the real issue was whether the disputed individuals fell within the ambit of the statute or exhibited the disability which the statute was designed to remedy. That formulation was endorsed by the U.S. Supreme Court in *N.L.R.B. v. Hearst Publications Inc.* (1944) 322 U.S. 111 where the Court said this:

*The mischief at which the Act is aimed and the remedies it offers are not confined exclusively to “employees” within the traditional legal distinctions separating them from “independent contractors”. Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation’s economy. Some are within this Act, others beyond its coverage. Large numbers will fall clearly on one side or on the other, by whatever test may be applied. But intermediate there will be many, the incidents of whose employment partake in part of the one group, in part of the other, in varying proportions of weight. And consequently the legal pendulum, for purposes of applying the statute, may swing one way or the other, depending upon the weight of this balance and its relation to the special purpose at hand.*

Unless the common-law tests are to be imported and made exclusively controlling, without regard to the statute’s purposes, *it cannot be irrelevant that the particular workers in these cases*

*are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for presenting them or curing their harmful effects in the special situation....*

*In short, when the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections.*

To eliminate the causes of labour disputes and industrial strife, Congress thought it necessary to create a balance of forces in certain types of economic relationships. These do not embrace simply employment associations in which controversies could be limited to disputes over proper "physical conduct in the performance of the service". On the contrary, Congress recognized those economic relationships cannot be fitted neatly into the containers designated "employee" and "employer" which an earlier law had shaped for different purposes. Its Reports on the bill disclose clearly the understanding that "employers and employees not in proximate relationship may be drawn into common controversies by economic forces", and that the very disputes sought to be avoided might involve "employees (who) are at times brought into an economic relationship with employers who are not their employers". In this light, the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as "employee", "employer" and "labour dispute", leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.

[emphasis added]

67. In practice, the application of these various common law tests and the resulting distinctions between "employees" and "independent contractors" were often artificial and difficult to sustain from a labour relations viewpoint. Individuals could be excluded from collective bargaining merely because the *form* of their relationship might not resemble that of "employer-employee", even though in substance they might be just as controlled by and economically dependent upon the party using their services as any employee. The legal label assigned could foreclose the exercise of the statutory right of self-organization, even where the "mischief" contemplated by the statute was clearly present. In Professor Arthurs' opinion, individuals, in a position of economic dependence, analogous to that of an employees, should be entitled to engage in collective bargaining. He wrote:

Unequal power between private persons, no less than between citizen and state, is an unhappy fact of modern society. In one area - employment relations - public policy has clearly adopted collective bargaining as a technique for redressing this imbalance of power. In another area - commercial competition - collective action is generally suspect as the vehicle by which a powerful group may overwhelm weak individuals. This study concerns the paradoxical plight of groups of competitors who may find survival difficult without collective action. They are often economically vulnerable as individuals because of the dominance of a monopoly buyer or seller of their goods or services, or because of disorganized market conditions. If viewed as "independent contractors" rather than "employees" they lack the legal status which is a prerequisite of the right to bargain collectively under labour relations legislation. As businessmen, they cannot legally employ collective tactics to buy or sell or otherwise stabilize conditions, because of the combines legislation. They are prisoners of the regime of competition.

Because the choice of either legal designation - "employee" or "independent contractor" - in effect prejudices the issue of their right to bargain collectively, a new term is needed: "dependent contractor." They are "dependent" economically, although legally "contractors". The ambiguity, the paradox, of their position is thus reflected in the term used to identify them. Self-employed truck drivers, peddlers, and taxicab operators, farmers, fishermen, and service station lessees personify the dependent contractor.

Insofar as dependent contractors share a particular labour market with employees, it is submitted, first, that they should be eligible for unionization. Such a result would require a new defi-

inition of the term "employee," perhaps along the lines of that adopted in Sweden: "For the purposes of this Act a person shall be regarded as an employee even if no normal engagement exists, provided that he performs work for another person and thereby occupies in relation to that person a position of dependence essentially similar to that occupied by an employee in relation to his employer." Second, courts and labour boards dealing with attempt by organized employees to immunize themselves from the impact of competition from dependent contractors should view this objective realistically.

In 1968, the (Federal) Woods task force on labour relations accepted and reiterated this concern in the following terms:

We are concerned about accessibility to collective action by groups of self-employed persons who are economically dependent for the sale of their product or services on a very limited market or who for other reasons may have economical characteristics of employees. We have in mind such groups as fishermen, owner-drivers of taxis, and independent owner-drivers of trucks and delivery vans.

In 1972, Professor Max Cohen, for the Newfoundland Royal Commission on labour legislation had this to say:

The issue of independent owner drivers, franchised owner drivers performing distribution functions for such industries as dairy products and bakery products, owner drivers of taxicabs, perhaps catering and janitorial services, home workers in the garment industry, etc., was not raised in any of the proceedings or briefs of the Commission. This is at least in part due to the fact that the level of organization in these segments of industry is not great.

Nevertheless, the report must give some consideration to this category of persons *on the grounds that they are in many circumstances analogous to employees in an economic sense although not meeting the definition of employee in the traditional legal sense of the master servant relationship which has been incorporated into the interpretation of labour relations legislation....*

On the merits, those persons at the margin who are denied collective bargaining rights *on the fairly technical grounds of the narrow legal rules of the master servant relationship would seem to be an appropriate group for inclusion in collective bargaining legislation.* These groups are similarly disadvantaged or subject to the disparate power of a single economic interest for whom they ultimately work in return for a fairly fixed payment based either on piece work or time consumed. The issues which these persons would want to discuss with the source of their payment, and, to some extent, direction, are closely analogous to those which employees have to discuss with the more traditional employer.

*In addition, where this technique of independent contracts is a circumvention technique to avoid collective bargaining, the purposes of public policy are directly flouted and such practices ought not to be tolerated on the grounds of technical legal distinctions.*

At the present time, such groups cannot collect their strength in dealing with the would-be employer without running the risk of infringing the *Combines Investigation Act* - to the extent that they, by virtue of their work affect the trade in commodities. Should services come under the *Combines Investigation Act*, their incapacities in this regard would exist despite the absence of any effect on articles of trade or commerce. In extending rights of collective bargaining to independent or "dependent" contractors, it remains necessary to draw some lines between the dependent category to be granted the protection of collective bargaining and those whose collective action is not held necessary and is seen as an undue impediment to the market forces to which competition policy is directed. Collective bargaining policy represents a deliberate exclusion authorizing market forces to be impeded within certain rules in pursuit of the social interests of distribution of wealth and the capacity of individuals in a dependent relationship to cope with their environment - which environment includes the dominant economic interests with which they must deal. Since the traditional master servant relationship rules do not provide a totally adequate basis for this definition, it is to be recommended that rules that adopt a set of criteria which recognizes the economic realities of dependency be introduced. It is therefore recommended:



Workers in a position of economic dependence analogous to that of the employment relationship should be accorded the right to organize and bargain under labour relations legislation.

68. In 1975, the Ontario Legislature accepted those propositions and enacted what is now section 1(1)(h) of the *Labour Relations Act*. It altered the legal regime to meet the perceived needs of individuals in a particular kind of economic relationship. A number of other provinces and the federal jurisdiction have similar provisions in their collective bargaining statutes; however, the language which the Ontario Legislature used, makes it abundantly clear that individuals *may* be entitled to collective bargaining whether or not they are employed under a contract of employment - that is, whether or not they would be considered to be employees in the traditional common law sense.

69. In *Adbo Contracting Company Ltd.*, [1977] OLRB Rep. April 197, the Board discussed the background and purpose of the then recent amendment, in a long passage to which we might usefully refer:

17. This case requires us to explore the outer limits of the *Labour Relations Act*. The purpose of this statute, as set out in its preamble, is to "further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees". The Act itself provides a structure for the organization of individual workers into combinations. Collective action by workers, once regarded as amounting to an illegal conspiracy, has been legitimized, the underlying rationale being the need to protect the individual employee from the worst extremes of the labour market. The countervailing power of collective bargaining can now be used by workers to obtain improved wages, hours of work, and other working conditions.

18. The *Labour Relations Act*, however, was never intended to insulate entrepreneurs from economic competition by allowing that class of person to act in combination. Such combinations not only fall outside the purview of collective bargaining legislation, but they are also expressly restricted by the federal *Combines investigation Act*. Collective bargaining policy, thus, expressly encourages combinations, while competition policy operates in the opposite direction. Given these two quite different policies, it then becomes important to identify the outer limits of our own statute, the *Labour Relations Act*.

19. The task of distinguishing between the individual worker and the true entrepreneur has never been easy. There exists an economic spectrum - colored at one end by the true entrepreneur and at the other end by the individual worker. These two points of the spectrum can be identified clearly. The businessman who sells goods, and employs others to produce these goods, is clearly not entitled to use the *Labour Relations Act* for the purpose of forming a combination with other businessmen. On the other hand, it is clear that the worker who supplies only his own labour to an employer is entitled to organize with other workers under the Act. At the shaded area toward the middle of the economic spectrum, however, it becomes difficult to draw a distinction.

20. The problem of drawing a distinction in this area is not a new one for this Board. The case of *Livingston Transportation Ltd.*, [1972 OLRB Rep. May 488 provides a good example of the difficulties faced by the outer limits of the Act. The question before the Board was whether certain truck owners were employees or independent contractors. In answering that question, the Board alluded to no less than four approaches that might be taken:

(1) resort to the control test used for determining the vicarious liability of an employer;

2) use of the four-fold test adopted by Lord Wright in *Montreal v. Montreal Locomotive Works Ltd., et al* [1947] 1 D.L.R. 101, a case concerning liability for municipal taxation;

3) simply asking the question of whose business is it;

4) application of what was referred to as "the statutory purpose test".

The multiplicity of approaches that emerged in the *Livingston* case is some evidence of the problems that then faced the Board when identifying the outer limits of the Act. Fortunately, there is now a new point of departure for distinguishing between the individual worker and the true entrepreneur.

21. The *Labour Relations Act*, having been amended in 1975, now provides a single, and less confusing, approach to the problem. Section 1 of the Act has been amended to provide that the term "employee" includes a "dependent contractor". That same section defines dependent contractor as "a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of independent contractor". Section 6 of the Act, moreover, has been amended to provide that "[a] bargaining unit consisting solely of dependent contractors shall be deemed by the Board to be a unit of employees appropriate for collective bargaining but the Board may include dependent contractors in a bargaining unit with other employees if the Board is satisfied that a majority of such dependent contractors wish to be included in such bargaining unit".

22. We do not construe the inclusion of these provisions in the Act as merely amounting to a legislative attempt to codify the Board's existing jurisprudence, such as *Livingston Transportation*. In those cases, the question had to be framed in terms of whether a person was an employee or an independent contractor. The Board, as a result, placed emphasis on a fourfold test as set out in *Montreal Locomotive Works*. The appropriateness of this test for determining the outer limits of a collective bargaining statute was always questionable. This concern has been best put by Dean Arthurs in his perceptive article, "The Dependent Contractor: A Study of the Legal Problems of Countervailing Power" (1965), U.T.L.J. 89. At page 94, he comments:

Whether the "control" or the "fourfold" test is the more appropriate for identifying the "master-servant" relationship is not here material. The pertinent question is whether the factors in employment relationship which invoke vicarious liability bear any relation to those which invite a regime of collective bargaining. The very terminology - "master" and "servant" - evokes a nostalgic Victorian image of authoritarianism which is collective bargaining's antithesis. More important, any rationale of vicarious liability focuses ultimately on the allocation of loss as between employer and injured third party, and not on the rights and duties of employers and employees, *inter se*. The control test and its modern successor, the fourfold test, are thus intended to identify those features of the employment relationship which will permit the employer to escape liability if he falls outside the rationale of vicarious liability. Control may be important if vicarious liability is based on a desire to discourage negligent work practices; use of the employer's tools or financial dependence upon him may be important if vicarious liability is based on a desire to reach the employer's "deep-pocket," or on a "loss-spreading" rationale. But the relevance of any of these considerations to situations where no third party is present is purely fortuitous. The rationale of labour relations legislation is that the public interest is best served by the promotion of collective bargaining between employers and their employees. Surely any meaningful definition must be formulated in the light of this statutory purpose....

23. The question that must now be answered by the Board is, not whether a person falling within the shaded area on the economic spectrum is an employee or an independent contractor but whether that person is a dependent contractor. This new point of departure does not mean that considerations formerly taken into account are now totally irrelevant. The statutory definition of dependent contractor clearly requires some reference to the employee-independent contractor distinction. A shift of emphasis has occurred, however, as this new definition recognizes that persons in an economic position closely analogous to that of the employee should also enjoy the benefits of collective bargaining. The determination of who is a dependent contractor is now a comparative exercise that requires reference to a much broader range of labour relations considerations.

24. This redefinition of the limits of the *Labour Relations Act* serves two purposes. First, it recognizes that, as a matter of fairness, persons in economic positions that are closely analogous should be given the same legislative treatment. A second purpose, and one no less important, is to protect existing collective bargaining rights from being eroded by arrangements that differ only in form, but not in substance, from the employment relationship. These two considerations provide the justification for the shift of emphasis.

25. The shift of emphasis is readily apparent from a reading of the definition of dependent contractor. Clearly a person need not be employed under a contract of employment to be considered as a dependent contractor, and provision of tools, vehicles, equipment, machinery is no longer a major consideration. Contractual form and the ownership of tools are no longer essential considerations. The emphasis, instead, is placed upon economic and business factors. Both the type of economic dependence that exists, and the kind of business relationship entered into, determine whether a person more closely resembles an employee than an independent contractor.

26. Economic dependence must be such that it puts the person in roughly the same economic position as an employee who must face the perils of the labour market. Mere economic vulnerability, however, is not a sufficient basis for finding that a person is a dependent contractor, since this is a condition that may be experienced by the true entrepreneur, just as much as the individual worker. There must exist, therefore, a type of economic dependence closely analogous to that of the individual worker.

27. This first requirement of a particular type of economic dependence is closely related to the second requirement of a particular kind of business relationship. In order for a person to be considered a dependent contractor, that person must not only be economically dependent upon another person, but also must be "under an obligation to perform duties for that person" roughly analogous to that of an employee. This reference in the statutory definition requires us to look beyond the factor of economic dependence to the form of the business relationship to determine if it is roughly analogous to that of employer and employee. Such an examination, however, need not result in the identification of a particular contractual relationship, since a business relationship may exist, and continue, in the absence of any particular contractual obligation. The Board, therefore, need not confine itself to this very narrow issue but may deal with the wider issue of the nature of the business relationship.

In *Adbo*, the Board was elaborating upon the observations of a differently constituted panel of the Board in *Nelson Crushed Stone*, [1977] OLRB Rep. Feb. 104:

Suffice it to say for our purposes that the Legislature intended by the amendment to address itself to the mischief created by persons who may very well outwardly manifest the trappings of independent entrepreneurs but who in an intrinsic sense are clearly in such a subservient economic position vis-a-vis the beneficiary of his [sic] services that he ought to be extended the protection intended by the collective bargaining process. In this context the Legislature recognized the economic vulnerability of depriving the "so called" small businessmen of rights under the Act and thereby exposing him to the arbitrary whims of the person upon whom he is dependent for his livelihood. Not only is this individual denied benefits commonly accepted in our enlightened society as industrial relations norms (e.g., unemployment insurance, workmen's compensation, statutory holidays, vacation pay, minimum wage and maximum hours, etc.) but is also by operation of *The Combines Investigation Act* susceptible to civil and penal sanctions should he, along with his colleagues, seek by concerted action to redress perceived wrongs in his relationship with his ostensible employer. The watch word of the definition is "dependent" and dependent is to be interpreted in a manner consistent with the economic reality of the relationship with the beneficiary of the service having regard to the industry or undertaking under review. It therefore follows that the status of the "dependent contractor" must be matched and plotted in relation to the terms and conditions of "employees" in like industries to determine whether he, in a *de facto* sense, more resembles them. And, alternatively, it may very well be that, notwithstanding shortcomings in his development as a businessman, he may be without the need or the assistance of collective security. We perceive that the Legislature has instructed the Board in the conduct of such analysis to sacrifice form for substance, to dispel superficial distortion that disguises industrial reality and to supplant individual want by supporting, in appropriate circum-



stances, collective equality. In short, the Board must deal with the new problem of defining the parameters not only between the employee and entrepreneur but also mid-way between that spectrum of distinguishing and isolating the "dependent contractor" who has statutorily been extended separate and distinct treatment.

70. For collective bargaining purposes the Legislature has abandoned the traditional common law distinction between "employees" and "independent contractors". Rather, the Act now identifies a hybrid creature - the dependent contractor whose rights depend upon the statutory definition, labour relations considerations, and the extent to which s/he is in an economic position roughly equivalent to those for whom this collective bargaining statute has been designed. The legal form of the relationship or the possession of particular assets (for example, the ownership of vehicles - something specifically mentioned in section 1(1)(h)) are no longer determinative of an individual's status for collective bargaining purposes. There is no requirement that s/he receive "wages", as there was in the Alberta legislation under review in: *Re Yellow Cab Ltd. and Board of Industrial Relations et al.* [1980] 2 S.C.R. 761. The test is whether the disputed individual is more like an employee than a self-employed entrepreneur, when viewed from a collective bargaining perspective and the "mischief" which this labour legislation was designed to remedy. It remains, as always, a question of just where to draw the line, because no magic formula can be propounded for determining which factors should, in any particular case, be treated as determinative. The Board must necessarily perform a balancing operation weighing up the factors which point in one direction or the other, and assessing them in light of labour relations policy considerations.

## IX

71. If the truly "independent contractor" or small entrepreneur is at one end of the economic spectrum and the "pure employee" supplying his labour for wages is at the other end, where do the working drivers in this case fit in - bearing in mind that neither ownership of the vehicle, nor the licence, nor the legal form of the relationship, nor the absence of "wages" are necessarily controlling factors? In our opinion, the working drivers of all stripes (i.e. broker-drivers, lessee-drivers and drivers), are really more like employees than independent contractors and should, as a group, be treated for collective bargaining purposes as dependent contractors.

72. What the working drivers supply to their respective companies is primarily their labour in the service of those companies' customers at times, places, and on terms specified by the companies or Transport Canada. The fact that these individuals may own or lease a car or a contract does not alter that basic equation. The company still exercises detailed control over the performance of their work - as it must, if it is to preserve its customers' good will and ensure that they are served in accordance with its own standards. For there is no doubt about whose customers they are: they are the customers of the limousine company and the driver cannot make his own arrangements with them or solicit customers on his own behalf. The labour component is a major feature of the working drivers' bargain, and that is precisely why the company must exercise such extensive control over their daily work pattern. The working drivers selected by the parties as representative, do not own or manage more than one contract or vehicle - a capital investment or managerial imperative which would make them look more like an independent contractor.

73. The working drivers are, for practical purposes, totally dependent upon the company for their sources of work and income, and have no independent discretion over the price charged for their services. Any attempt to exercise such independent action would result in economic penalties. Even within the regime of regulated zone rates, the working driver cannot expect an assured fare structure, because the company can unilaterally introduce discount coupons or rates for particular customers which the driver is required to accept. The working driver is not even entitled to choose his own customers because, once again, the rejection of a fare referred through the com-

pany system or in accordance with the platform lineup can result in penalties. The working driver cannot turn down an uneconomic short fare or compete with other drivers (or companies) for customer attention. And the company rules prescribe (again with the threat of penalties) virtually every detail of the drivers' daily routine, right down to the colour of their shirts and socks. The company retains an effective (if residual) veto, which it does not hesitate to exercise whenever the drivers engage in behaviour of which the company disapproves. Ultimately, the company reserves the right to terminate the relationship altogether. It is the equivalent of a "discharge".

74. The company initially selects the working driver whom it will permit to work within its organization whether as a broker, lessee-driver, or driver. No one works within the company's organization without its approval. The company monitors their behaviour on the job, and can effectively terminate that relationship at will. Because Transport Canada controls the fare structure (except in the case of private discounts worked out between the company and its corporate customers *without* driver concurrence), the established fees and frequency of work referrals effectively govern the remuneration of the working drivers to whom work is distributed and paid for on a kind of "piece work" basis. These factors also make the working drivers look more like employees of their company than the independent entrepreneurs that the companies claim them to be. In a very real sense, the working drivers "work" for their company and not for themselves - a perception which is no doubt shared by the public who contact the company for limousine services rather than any particular driver (the driver being prohibited from accepting even if such individual contact were made). They are totally integrated into the company's organization. They are not autonomous, independent economic units, and are only ambiguously in business "on their own account".

75. There is, without doubt, quite a significant financial investment on the part of the broker-drivers, to a lesser extent on the part of lessee-drivers, and to a minimal degree on the part of "pure" drivers who lease blocks of time from, and share costs with, persons higher in the financial pecking order. Obviously it is unusual for an employee to have such investment in "tools" or "vehicles" (although the statute says this is not determinative) and it is unusual for an "employee" to, in effect, pay for the privilege of working in the hope or expectation that s/he will generate sufficient income to offset these costs. It is unusual for an employee to enter into such cost-sharing arrangements with someone else; and there is no doubt that at all levels the participants hope to gain, and run some risk of loss from their economic arrangements. Within the constraints set by the company, the working drivers do have some flexibility with respect to their work pattern, they do regard themselves (for some purposes, at least) as "self employed", and they may claim certain income tax advantages associated with that status, and not available to a traditional "employee". And, of course, to some extent they can substitute the labour of someone else for their own. All of these factors differ from a "normal" employment relationship and point in the direction of a finding that they are independent contractors. But we are not particularly influenced by that contractual assertion appearing in the service contract. In our view, it would be a mistake to set too much store by the particular words used in the contract because that would be to concede to the parties the right to decide what is, in effect, a question of law and statutory interpretation. The working drivers do not become "independent contractors" - let alone dependent contractors - simply because their service agreement or lease assigns that label to them.

76. For the working drivers there is very little evidence of entrepreneurial activity such as self-promotion, advertising, the aggressive solicitation of business from other competitors, product differentiation, price competition or the organization of one's business to take advantage of limited liability or the tax laws. The working drivers cannot advertise. They cannot promote themselves. They cannot serve anyone other than through the auspices of the company. They cannot incorporate or transfer their assets to someone else without the approval of the company. They cannot



engage anyone to assist them in their work responsibilities without the approval of the company. They cannot move to another company without a favourable letter of reference. Their so-called "chance of profit" or "risk of loss" (to borrow phrases from *Montreal Locomotive*) has little to do with their business acumen, sensitivity to the market, astute investment, innovation, risk taking, or a perceptive and profitable reading of customer needs or the market place. The working drivers' business horizons are almost totally circumscribed by their company organization on which they are totally dependent for their work opportunities and revenue flow. This is so even though the working drivers describe themselves as "self-employed" or working in their own "small businesses". But "those businesses" are in fact really only facets of the companies' business, and the rules of engagement are such that this will remain the case. The working drivers cannot solicit their own customers, or develop their "business" or clientele, they cannot set the price for their own services (even their own discounts), they cannot refuse customers at rates or discounts dictated by the company, and they really cannot even decide not to work unless they arrange for a fill-in driver, acceptable to the company, to cover such periods. It is true that the "working drivers" need not work any particular hours and can "cover off" one another provided that all working drivers are approved by the company (and of course work subject to the same disciplinary regimen). It is also true that if the company demands that the car be in service unusually early, or stay in service unusually late, or make an uneconomic trip downtown, empty, those demands must be complied with. A broker-driver who wants a holiday can take one provided that he arranges for a substitute driver approved by the company. These are certainly not the hallmarks of an independent contractor.

77. If the purchasers of an individual's services are numerous and of diverse character, that is, if s/he sells his or her services to the market generally, then that individual looks more like a self-employed small business person than an employee. There is less likely to be the kind of economic dependence or control characteristic of an employment relationship (although even here the situation may be cloudy in the case of part-time workers who move from job to job). In the instant case, however, the owner-operators, lessee-drivers, and drivers have an established, consistent and generally long-term relationship with only one entity, their particular company; and both the terms of that relationship and the market in which they operate significantly limit their ability to put their skills to the service of others. As we have already mentioned, they cannot solicit their own customers. They may move from one company to another, just as an employee could move from one employer to another, but given the constraints of the airline limousine business, their economic mobility and independence are necessarily limited. Nor, from a practical point of view are the working drivers really free to reject job opportunities and work when and where they wish. Not only does economic need preclude extensive time off, but, while "at work" they are prohibited from refusing company customers and any persistent failure to serve those customers in the manner and time specified by the company would undoubtedly lead to a severance from the company organization. They are put off the air and denied "business" if they do not check in on time, and for any number of other reasons, specified unilaterally, by the company, and must report to the dispatcher if they will be only a minute or two late in picking up a customer. Where is the "independence" characteristic of the "independent contractor"? If one asks Lord Denning's question: "Whose business is it?", the answer is abundantly clear. The owner-operators, in essence, do not carry on an independent business on their own behalf although they have many characteristics of an independent contractor. Rather, they are an integral part of their company's operating organization and are subject to its express, direct, and detailed co-ordination and control over the "when", "where", and to a great extent "how" their labour will be utilized. And what independent contractor or entrepreneur is required, in order to work, to transfer title to an essential "tool" of his trade (here, a vehicle) to the purchaser of his services, and why should he feel compelled to do so unless his activities are totally subservient to and integrated into the organization of the purchaser?



78. In all of these respects the working drivers resemble employees rather than the independent contractors that the respondents claim them to be. In two respects, however, they do not: their compensation/remuneration does not flow directly from the company in the form of “wages” (except perhaps in the case of the charge account or voucher customers whose arrangement with the company involves a paper transaction in which funds may flow to the working driver); and the broker-drivers, lessee-drivers and drivers arrange between themselves, on terms which they negotiate with each other for the coverage required by the service contract including “off hours”, weekends or holidays when some of them may not wish to work, and the formula for costs/gains sharing. It is not common for a group of “employees” to decide among themselves how to cover a particular shift or how the rewards (and risks) for working on that shift will be divided.

79. The first factor flows from the special market context of the limousine industry and is probably not particularly significant. The second factor is more troublesome. Both deserve brief comment.

80. As we have already mentioned, the limousine business is a highly regulated one in which the standard fares, set by Transport Canada, must necessarily be collected, in most instances, by the driver having immediate contact with the customer concerned. There are no “wages” as such. The drivers’ income is derived from what is left after the fees and disbursements payable to others. However, in keeping with the Board’s past approach in such matters (see *Blueline Taxi Co. Limited*, [1979] OLRB Rep. Nov. 1056, *Niagara Veteran Taxi*, [1981] OLRB Rep. Feb. 198, and *Windsor Airline Limousine Services Limited*, [1981] OLRB Rep. March 398), we do not think that this is the critical characteristic in situations involving owner-operators who are arguably dependent contractors. In *Blueline*, *supra*, for example, the Board observed:

8. It is argued that despite the flow of work opportunities being through the respondent that no compensation or reward flows directly from the respondent to the owner-drivers but rather that all revenues flow from third-party passengers and the owner-drivers are totally at risk for the collection of such; and that this factor distinguishes the instant case from previous cases considered by the Board where the responsibility of revenue collection from third parties was assumed by the respondent and payments flowed directly from the respondent to the owner-driver. In our view this single factor cannot be allowed to obscure the fact that the control of work opportunities by the respondent is of, and in itself, the *sine qua non* of the economic dependence which here exists, and the form of compensation for the service performed is determined by the type of market being served. This form of compensation, combined with the stand rental flowing back to the respondent, must be viewed in the total context of the taxi industry, and is not sufficient to make the driver more closely resemble an independent contractor than an employee.

Similarly, in *Niagara Veteran Taxi*, *supra*, the Board commented:

18. Taxi owner-operators are often a triangular relationship with the company they work for and the passengers they service. That the major source of their income happens to be paid to them directly by passengers rather than a taxi company does not itself alter the relationship between the owner-operator and the taxi company.

19. Another kind of triangular relationship was fully analyzed by the Board in *A. Cupido Haulage Limited*, [1980] OLRB Rep. May 679 where truck owner-operators were in a triangular relationship with a broker, A. Cupido Haulage Limited, and the quarry owners, Canada Crushed Stone. In this situation when owner-operators’ compensation was paid by the broker, notwithstanding the fact that they received their compensation from the broker, the Board held that the owner operators were economically dependent on Canada Crushed Stone.

20. The purpose of the dependent contractor amendments to the Act was, generally, to enable persons to engage in collective bargaining who, despite numerous earmarks of independent contractors, are in essence dependent for their livelihood on the person or company for whom they perform services for compensation or reward. It would thwart the intention of the legislature if

such persons were denied dependent contractor status just because they receive their compensation directly from the client serviced rather than their employer. This is especially true when neither the scheme of the Act nor the definition of "dependent contractor" stipulates that compensation or reward must come directly from the employer.

81. We are inclined to accept these views. We do not think that in the context of this industry (as the Board has consistently found in the taxi industry) the collection of fares set by a regulatory authority is a critical element in the working drivers' relationship with their controlling company - particularly where such company retains a significant influence over the flow of work opportunities and controls the fees or deductions which will necessarily be subtracted from the drivers' revenue. Whether or not the drivers could influence such fees or could protest by withholding their labour (an activity which looks remarkably like a strike of "employees"), the fact is that the companies do prescribe the fees which the working drivers must pay and any increase in those fees would reduce the working drivers' income proportionally. And, if dissatisfied, those working drivers would have little option except to go to work for some other limousine company - a position analogous to that of a disgruntled employee and which, it seems, might be ineffective in any event because the companies seem to have agreed among themselves to standard contractual terms.

## X

82. The alleged "employment" of others is particularly important from a labour relations or collective bargaining perspective because this suggests a relationship more closely resembling that of an independent contractor who, in fact, is also exhibiting the attributes of an employer - a category of individual that the *Labour Relations Act* quite clearly excludes from the process of collective bargaining.

83. However, once again, the commercial reality does not always correspond neatly with these precise legal categories, or their labour relations underpinnings. The broker-driver, for example, does not enter into a lease arrangement or engage a driver to "profit from his labour" in any material sense, but rather to fill in for the times when he cannot work, and to preserve the continuity of his commitment to the company. On the evidence, the drivers working a particular car tend to be friends or relatives working together, splitting the costs and adhering, as they must, to the rules and regulations prescribed by the company. The broker-driver or lessee-driver is an "employer" or "manager" in form only; for the meaningful lines of accountability still run between the company and the driver (of whatever category) who, on the job, remains subject to the company's detailed rules, direction and control. If anything, the relationship between the working drivers resembles a kind of partnership in which all are bound together, in varying degrees and may profit from providing their services to their sole customer. The working drivers all derive their income from the name, good will, dispatch services or economic arrangements entered into by the company and they are subject to the same rules of behaviour and disciplinary regimen. The company can tolerate the substitution of drivers because anyone working in its system must conform rigidly to its own detailed prescriptions about the way that things must be done, and the company both retains and exercises the right to discipline or terminate any driver that does not meet those norms.

84. The use of a helper or "fill-in worker" to share the costs or lighten the load of a person alleged to be a dependent contractor has never been considered, by itself, to be an entrepreneurial endeavour which would create a situation more closely resembling an independent contractor than an employee or would preclude involvement in collective bargaining. (See: *Comfort Guard Services Ltd.*, [1978] OLRB Rep. Oct. 905, *Dominion Dairies Limited*, [1978] OLRB Rep. Dec. 1083, *Niagara Veteran Taxi*, [1981] OLRB Rep. Feb. 198, and *Windsor Airline Limousine Service*



*Limited*, [1981] OLRB Rep. March 398.) In *Dominion Dairies Limited* the Board put the problem this way:

The line between contractors whose activities are more closely analogous to those of a wage earner, so as to make them dependent contractors, and contractors who are sufficiently entrepreneurial as to be excluded from that definition is not easy to draw. It can only be drawn in the light of the facts of each particular case. In Canada *Canada Crushed Stone* the Board found that a contractor who owned 10 trucks which were driven by seven employees in an aggregate material hauling business that grossed \$250,000 per year was not, by virtue of the entrepreneurial nature of his business, a dependent contractor within the meaning of the Act. In a more recent decision, *Comfort Guard Services Ltd.* (Board File No. 2007-77-R, as yet unreported, Oct. 6, 1978) the Board found that a heating equipment service contractor was not deprived of status as a dependent contractor merely because he sometimes made use of a helper on his service calls. In that case the Board determined that the use of a helper merely to lighten the serviceman's load was to be distinguished from the use of an employee hired on a regular basis to drive a second vehicle and make separate service calls, thereby substantially increasing the contractor's capacity to profit.

When the Board is faced with the question the effect of the use of paid help by a contractor it must determine whether, in the light of all the evidence, the person or persons is used merely to assist the contractor in the performance of his work or in fact to perform work that is separate and beyond the work done by the contractor, so that the contractor may fairly be characterized as master of a business that profits in a substantial way from the labour of others.

In this case the Board is satisfied that the contractor drivers who make use of single helper, whether occasionally or regularly do not cease to be dependent contractors by virtue of that fact. The use of a young helper to lighten the load during the summer season, to shorten the hours worked on a Saturday or to eliminate the burden of stairs on a daily basis does not thrust the contractor-driver into an entrepreneurial undertaking that can be meaningfully described as deriving profit in any substantial way from the work of others. The contractor-drivers examined used helpers when they were employed as milkmen and represented for collective bargaining purposes by the applicant prior to 1970. At that time the Board had recognized that the use of a helper did not of itself deprive an individual of his status as an employee under the Act. (*Automatic Fuels Limited*, [1966] OLRB Rep. Apr. 22).

85. In the instant case, however, the "pure" drivers are not even "paid help" in the sense considered by the Board in *Dominion Dairies*. They are not "paid" by the broker-driver or lessee-driver, and both parties to the arrangement consider themselves to be self-employed. (So do the respondents - except in the alternative.) Unlike regular employees or hired helpers, they must pay for the right to participate in the work opportunities provided (on its own terms) by the company; and are subject to all of the controls and constraints to which we have already referred. For the purposes of the *Labour Relations Act* (particularly having regard to the context here and the dependent contractor provisions) we do not think that the broker-drivers or lessee-drivers should be considered "employers" of their co-workers. Nor (again in this context), in the opinion of the Board, do the broker-drivers and lessee drivers exercise "managerial functions" within the meaning of section 1(3)(b) of the Act. In a meaningful labour relations sense (and bearing in mind that we are dealing with dependent contractors), we are satisfied, on the evidence, that such authority is exercised by the company.

## XI

86. In the instant case we have quite a bit of evidence about the elaborate contract and sub-contract relationships wherein the companies as recipients of plates issued to them by Transport Canada attempt to ensure that, profitably, limousine services are provided to the public. The evidence establishes that none of the subcontractors providing that service earn "wages" in the usual sense. Many of them have a significant investment in the contract which establishes their right to



work or in the automobile which is an essential tool of the trade. Even the "pure drivers" work under a kind of lease arrangement in which they pay for the opportunity to drive in the hope that the fares that they will collect will exceed the amount tendered. Even the "pure drivers" are engaged in a form of cost or risk sharing, seek some opportunity for "profit" and claim (for some purposes at least) to be self-employed - albeit while at the same time recognizing that their work/profit opportunities are significantly circumscribed by rules imposed unilaterally by the company. In essence, all of the working drivers are "contractors" or "lessees" to some extent, and subject to terms, working conditions and risks which are uncharacteristic of an ordinary employee. On the other hand, they are still very much subject to the detailed direction and control of their particular company in a manner not unlike that of an employee, and their activities are totally integrated with, and subsumed by, that company's organization. Having regard to the totality of the evidence, we are satisfied that all of the working drivers (i.e. broker-drivers, lessee-drivers, and drivers) are properly regarded as dependent contractors of their respective companies within the meaning of the *Labour Relations Act*, and therefore "employees of those companies". Pursuant to section 6(5) of the Act they therefore form an appropriate bargaining unit. Section 6(5) reads as follows:

6(5) A bargaining unit consisting solely of dependent contractors shall be deemed by the Board to be a unit of employees appropriate for collective bargaining but the Board may include dependent contractors in a bargaining unit with other employees if the Board is satisfied that a majority of such dependent contractors wish to be included in such bargaining unit.

Such units should be described, in general terms, in this way:

All dependent contractors of the respondent(s) [company name(s)], in its limousine service working in and out of the Municipality of Metropolitan Toronto and the Regional Municipalities of York and Peel, save and except dispatchers, office and sales staff, supervisors and those above the rank of supervisor.

[We might observe parenthetically that the resulting combined unit of broker-drivers, lessee drivers, and drivers, would not appear to be inconsistent with the grouping(s) represented, in a less formal way, by the owners and drivers association mentioned in paragraph 59 above. Nor is this particularly surprising given the extent to which all of the dependent contractors are subject to the company's control, and, for that reason, also share a community of collective bargaining interest.]

## XII

87. The brokers who do not drive, whether they own one contract or several, are, we think, in a different category. In a sense, they too are part of the company's organization. They have contractual obligations and reap economic rewards because of their status as a broker. However, their situation is quite different from that of the working drivers because they do not drive, and thus do not supply their own labour in direct service of the company's customers. They are not subject to the same elaborate network of control which makes the working drivers look more like employees of the company than independent contractors. The non-driving brokers need not and do not appear at the airport at 5:45 a.m. every morning. They do not pick up customers directed to them by dispatch or the platform lineup. They need not wear the regulation uniform or follow the elaborate rules in the drivers' manual. And so on. As one non-driving broker put it, he is "managing a franchise" and, in our opinion, that characterization is not inaccurate. The non-driving brokers are managing and profiting from their investment in a way which is analytically and generically different from the working drivers who, in addition to their ownership or lease of a service contract, are expending their labour in the direct personal service of the company's customers, subject to the detailed controls to which we have already referred at length. In our view, for collective bargaining purposes, the non-working brokers are not dependent contractors within the meaning of section 1(1)(h) of the *Labour Relations Act*.

88. We should add that we do not think their presence in the economic matrix alters the fact that their subcontractors, the working drivers, *are* dependent contractors vis-a-vis one or other of the respondent firms. The non-driving brokers, on the evidence, simply do not exercise “employer-like” authority over the working drivers any more than does the automobile dealership which leases one of the “lessee-drivers”, the vehicle which he needs to fulfill his service obligations. Those controls are exercised by the company. To the extent that a non-driving broker *did* seek to exercise such employer-like functions, a section 1(4) declaration might be appropriate, but that is an eventuality which need not be pursued here. To the extent that one might conclude that they, too, are “dependent contractors” (as we expressly do not), it is clear that they have a very different community of interest and should not, on that basis alone, be included in the same bargaining unit as the working drivers.

### XIII

#### The Livery Service

89. The parties were not in agreement about the treatment of the so-called livery service drivers whom the company (“Airlift”) contends should be included in any bargaining unit of working drivers operating in and out of the airport. The problem is that we do not have much evidence of the drivers’ terms and conditions when engaged in livery work. We do know that there is some interchange - that is, dependent contractors who drive within the airport limousine system may also work in the livery service; but when so doing they are clearly *not* subject to the regulatory framework in effect at the airport, including zone fare controls, periodic dispatch, platform lineup, special licensing requirements, Transport Canada scrutiny, etc. We do not have much evidence about the way in which livery drivers are paid, how their engagements are arranged or what control they or the companies have over accepting such work. In short, we are unable to conclude that the livery drivers, as such (i.e. when working in that capacity), are *dependent contractors* who should be included in a bargaining unit with the working airline limousine driver. If anything, the evidence points to a separate community of collective bargaining interest because the scope of bargaining issues, including remuneration, would appear to be much broader in the livery section of the company’s business than it is at the airport. Moreover, in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, the Board commented upon its role in bargaining unit determination as follows:

We are troubled by the fact that a largely administrative and policy-laden determination has mushroomed in some cases into an elaborate, expensive, and time-consuming process for deciding a relatively simple question: does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargaining together on a viable basis without at the same time causing serious labour relations problems for the employer?

The issue is not whether some broader employee grouping might also be appropriate, but whether what the union has applied for is appropriate. In our view it is.

90. We are satisfied that whatever the status of the livery service drivers, a unit of working drivers working in and out of the airport meets the test enunciated in *Sick Children’s Hospital* and that a bargaining unit excluding the livery service drivers will not create serious labour relations difficulties. We shall continue to process File No. 1594-84-R naming as respondent Airlift Limousine Service Limited. However, we are not persuaded, on the evidence before us, that the livery service is a separate corporate entity (leaving aside the notice issues which will be explored below); and, in any event, we are satisfied that the livery service can be dealt with as a distinct “division” and bargaining unit within Airlift’s operations. The “standard” bargaining unit outlined in paragraph 86 above will therefore be augmented by a short clarity note indicating that the drivers’ unit

for each respondent firm will not encompass drivers when working in the livery operation; however, such livery operation may be, in itself, a separate bargaining unit.

#### XIV

#### Related Employer Questions

91. Section 1(4) of the *Labour Relations Act* reads as follows:

1(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

92. Section 1(4) was enacted in 1971 and deals with situations where the economic *activity* giving rise to employment (or collective bargaining) relationships regulated by the Act, is carried out by or through more than one company. Where such companies carry on related business activities under common control or direction, the Board is empowered to declare them to be “one employer” for labour purposes. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment the collective bargaining structure. In the context of a certification application section 1(4) allows the Board to make a related employer declaration in order to “pin down” the bargaining rights, from the start (see *Bright Veal Meat Packers Ltd.*, [1981] OLRB Rep. March 247 and *Harwill Originals Ltd.*, [1982] OLRB Rep. June 875). In *Bright Veal*, for example, the respondent employers operated two separate but related operations from the same premises. There were different companies and company names but really only one “business”. They successfully argued that it made labour relations sense to treat the two companies as one single employer.

93. The parties participating in these proceedings have all agreed, before the Officer, that the respondents “McIntosh” and “Aaroport” should be treated as one employer for the purposes of the *Labour Relations Act*. They agree that they are really one business despite the two names. The union submits that, in addition, “Air Cab” should also be joined as a related employer. From page 65 of the limousine companies’ written submissions, however, we take it that (Macco Ground Services Limited, operating as) Air Cab Limousine resists any section 1(4) declaration which would bind it, for collective bargaining purposes, together with McIntosh and Aaroport. There is agreement to the application of section 1(4) to McIntosh and Aaroport. There is no similar agreement with respect to Air Cab.

94. However, at this point, we do not have to decide that issue.

95. The potential application of section 1(4) only arose *after* these proceedings got underway. Perhaps the union only recognized the corporate relationships and business connections after it became embroiled in the case; however, the fact is that no related employer application has been filed in accordance with the Rules, and, in consequence, none of the working drivers potentially affected by a related employer declaration have had any notice of that possibility. Counsel for the union, the respondents, and the representatives of the objectors met with the Officer and agreed upon at least a limited application of section 1(4), but so far as the working drivers are concerned that issue was not even raised in the notices they would have received. While we do not wish to seem unduly “technical”, neither do we wish to make a determination on an issue which was not



raised in the initial applications, could not reasonably have been foreseen by the working drivers, and might, conceivably, be of interest to them.

96. It may very well make labour relations sense to make a section 1(4) declaration with respect to at least two and possibly all three of these companies. Even from the employer's point of view, it may make sense for those with closely related activities to bargain together rather than face the prospect of separate bargaining tables and selective strikes. Indeed, it seems that in the past there has been a form of employer association even for entities which would *not* meet the requirements of section 1(4). In the circumstances of this case, however, we make no related employer declarations *at this time*. We do direct that a notice to drivers be posted or otherwise brought to the attention of the individuals who might be affected by such related employer declaration as the present active parties have agreed to. If we do not receive any representations from the affected drivers of McIntosh or Aaroport within 30 days of the release of this decision together with their written submissions as to why we should *not* declare these two companies to be one employer, we shall accept the agreement of the participating parties and make such consent declaration.

97. Similarly, if the union seeks a related employer declaration respecting Air Cab, it is directed to file a section 1(4) application and if such filing is made, the parties are further directed to set out, in writing, in detail, their positions with respect to Air Cab; and whether it too should be treated as one employer for labour relations purposes. Insofar as the employer "Air Cab" is concerned, that amounts to no more than specifying, in advance, the facts which it is obliged to supply, in any event, pursuant to section 1(5) of the Act.

98. Since each respondent company maintains a record of its "approved drivers", and those drivers maintain dispatch and commercial relationships with the companies, on a regular basis, we do not think this communication and posting requirement should be an onerous burden. If the union chooses not to make a 1(4) application respecting Air Cab, at this time, the certification application for that company will proceed in the usual way.

## XV

### The Successor Union Question

99. Section 62 of the *Labour Relations Act* reads as follows:

62.-(1) Where a trade union claims that by reason of a merger or amalgamation or a transfer of jurisdiction it is the successor of a trade union that at the time of the merger, amalgamation or transfer of jurisdiction was the bargaining agent of a unit of employees of an employer and any question arises in respect of its rights to act as the successor, the Board, in any proceeding before it or on the application of any person or trade union concerned, may declare that the successor has or has not, as the case may be, acquired the rights, privileges and duties under this Act of its predecessor, or the Board may dismiss the application.

(2) Before issuing a declaration under subsection (1), the Board may make such inquiry, require the production of such evidence or hold such representation votes as it considers appropriate.

(3) Where the Board makes an affirmative declaration under subsection (1), the successor shall for the purposes of this Act be conclusively presumed to have acquired the rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise, and the employer, the successor and the employees concerned shall recognize such status in all respects.

100. After the commencement of this proceeding, the Board was advised that the applicant "Teamsters Local Union No. 352", had been merged with a sister "Teamster, Local No. 938".

However, the only evidence in this regard was a letter from certain union officials which did not detail the manner in which this purported merger had taken place. The respondents take the position (to put the matter colloquially) that this is “news to them”; and they are not prepared to agree that Local 938 is the “successor” without more detailed information about just how this purported merger was accomplished. Moreover, once again, we have a “notice problem” because working drivers purportedly joining and seeking representation by Local 352 could end up being represented by Local 938. This may not, in fact, matter very much to them, but eventual membership in one local or another could well be significant - given that the “locals” are really different unions under the *Labour Relations Act* and may well have a different membership base.

101. More difficult, though, is the way in which section 62 is framed. Its application is quite clearly restricted to situations where, at the time of the purported merger, a trade union “*was the bargaining agent of a unit of employees....*”. That is not the case here. The applicant, Local 352, is *not* the bargaining agent of any unit of employees - yet. Unlike section 63 which provides that a successor employer is “plugged in” to an ongoing certification application as if it had been a party thereto, section 62 contains no similar language. Thus; not only have interested parties had no notice of this purported successorship, which the employers demand be proved, but it is not at all clear that section 62 even covers the situation. Nor does section 104, which refers to the correction of a party’s name when a *bona fide* mistake has been made. For all of these reasons, the case will proceed with Local 352 remaining as the named applicant. Should the union(s) consider it appropriate to make a formal section 62 application at some later date, they will, of course, be free to do so.

## XVI

### **The Composition of the Bargaining Unit - Who should be treated as an employee for the purposes of this Certification Application?**

102. Section 7 of the Act requires the Board to “ascertain the number of employees *in the bargaining unit at the time the application is made*”; however, there are no legislated criteria to guide the Board in this task. The determination as to whether a person is or is not to be treated as an employee in the bargaining unit on the application date is left to the Board to decide, and of course, there is really no difficulty in respect of those individuals who are both employed and *actually working* on the application date. The problem arises in the case of persons who might have some claim to employment status for certification or collective bargaining purposes, but who were not actively at work on the application date, and may not even be scheduled to work for some time thereafter. Persons on sick leave, maternity leave, long-term disability, Workers’ Compensation or layoff may fall into this category. So could persons employed on an irregular or contingent basis, as in the instant case, where the broker-drivers, lessee drivers, and regular drivers may occasionally be placed by “fill-in” persons from time-to-time, as needed.

103. To cope with these practical problems, the Board has, over the years, developed a number of “rules” or “standardized approaches” concerning the way in which it should go about its task of ascertaining the number of employees in the bargaining unit on the application date. In most non-construction situations, the Board has been disposed to apply what has now come to be known, as its “30/30-day rule”. In order to meet the requirements of the 30/30-day rule, an employee not actually at work on the application date must *have* worked at some time in the 30-day period immediately preceding the application *and* work, or be expected to return to work at some time in the 30 day period immediately after the application date. Of course, like all rules, this one could be considered somewhat arbitrary; however, the fact is that it has withstood the test of time (at least 30 years), and without it or some similar arbitrary rule, it would be impossible to

expeditiously process the hundreds of certification applications which come before the Board every year. The 30/30 rule has been regularly and routinely applied in a variety of industrial contexts to the obvious advantage of parties who must make or respond to certification applications. No rule is written in stone; but there is a substantial onus upon any party seeking to persuade the Board to depart from this well-established, useful, and well-accepted practice. In *Board of Education for the City of Toronto*, [1983] OLRB Rep. Feb. 273, for example, the Board had this to say:

24. Thus, to be included as an employee in the bargaining unit for the purposes of the count, a person who was not at work on the date of the application must generally have been at work at some time during the one month period prior to the application date and have returned to work (or have been expected to return to work) within the one month period following the application date. (See also *Brewer's Nursing Home*, [1981] OLRB Rep. July 852; *Irwin Toy Limited*, [1970] OLRB Rep. Dec. 912; *Keynorth Limited*, [1970] OLRB REP. JULY 477; *Mobile Cartage and Distributors Ltd.*, [1968] OLRB Rep. Nov. 814 and *West Elgin District High School Board*, [1968] OLRB Rep July 379.) This long standing practice of the Board enables the parties to ascertain in advance of the hearing the persons who will be included for purposes of the count (see *Sydenham District Hospital*, [1967] OLRB Rep. May 135). A further reason for the existence of the practice is that it tends to exclude from the count persons who have not been at work during the trade union's organizing campaign and have not had an opportunity to express their support for or opposition to the trade union (see *Bertrand & Frere Construction Co. Limited*, [1965] OLRB Rep. July 292). See also *Sherman Sand and Gravel Ltd.*, [1978] OLRB Rep. May 460....

...

27. Board practices such as the seven week rule (described in *Westgate Nursing Home Inc.*, [1981] OLRB Rep. April 503), and the thirty day rule described above, are guidelines, not hard and fast rules. However, since such guidelines are known, accepted and relied on by unions and employers alike, there is a substantial onus on any party requesting the Board to depart from such practices (see *Trenton Memorial Hospital*, OLRB Rep. Jan.116 and *Sherman Sand and Gravel Ltd.*, *supra*). In the circumstances of the instant case, the Board does not find it appropriate to depart from its normal practice of applying the thirty day rule....

104. In setting out what the parties and the Board refer to as the "30/30" rule, we have not ignored the fact that this guideline is a procedural construct arising from the Board's own experience, and adopted in certification proceedings to facilitate the process and give some predictability to resolving the list of employees. By adopting this practice the Board has sought to make it easier for the parties appearing before it to come to their own agreement on the status of employees, and for employees and their unions to gear their organizing campaigns accordingly. These guidelines cannot, of course, be applied in an arbitrary way without regard to the case before the Board; and, it is recognized that one could plausibly draw the line in other ways, or try to fashion, in each case, individualized criteria which would most perfectly meet the particular circumstances under review. Every case could be viewed as a novel situation with the Board reviewing the circumstances of each employee, one by one, to determine whether s/he had sufficient connection to the work place, for *collective bargaining purposes*, to warrant inclusion in the bargaining unit. That approach might even generate, in particular cases, a "more perfectly representative" grouping of workers - at a cost, perhaps, of undermining the certification process itself, which would quickly become bogged down in litigation over the precise composition of the bargaining unit. With certification applications now numbering over a thousand each year, there is an obvious need for procedural certainty and predictability, in order to serve the expectations of the labour relations community and process certification applications in accordance with the spirit of the Act which is expressed in its Preamble:

WHEREAS it is in the public interest of the Province of Ontario to further harmonious relations between the employers and employees by encouraging the practice and procedure of col-



lective bargaining between employers and trade unions as the freely designated representatives of employees.

That is why the Board has always held that there is a substantial onus on any party requesting that the Board depart from established approaches which are known, accepted, and relied upon by unions and employers alike. Over the years, the Board has come to view that the tug towards adjudicative perfection in particular cases must give way to administrative reality and the need for guidelines which will lead, in most cases, to established and predictable results. For, of course, no approach adopted by the Board could ever achieve perfect decimal point democracy, or command the unqualified acceptance of partisans in particular cases.

105. The difficulty with the 30/30 rule in the instant case(s) is not its logical, labour relations, or administrative underpinnings. We are satisfied that even in the rather special situation of proposed units of dependent contractors, the 30/30 rule is a reasonable test of "connection" to one of the respondents so as to warrant inclusion in a composite drivers' bargaining unit. The problem arises because it appears that neither the respondents nor the dependent contractors keep reliable records which permit an accurate determination of who is driving, and when.

106. In most employment situations an employer will maintain records (time cards, payroll slips, etc.) which will establish the employees' work pattern; and while this documentary material is undoubtedly hearsay, it will generally provide a fairly reliable basis for establishing the composition of the bargaining unit. Here, however, the employers submit that they do not maintain any records which would assist the Board. The respondents will have a list of "*eligible*" or "*approved*" drivers, but we accept their submission that it is a matter of indifference to them who is driving on any particular day, so long as the car is on the road every day between 5:45 a.m. and midnight.

107. The evidence establishes that each car will have two or three principal drivers, all of whom must be on the company's approved driver list, and some of whom will have direct contractual relationships with the company. It seems reasonable, therefore, to infer that all broker-drivers or lessee-drivers will have driven on the application day or in the month immediately preceding or following it. Their inclusion on the list should not be a matter of dispute. The uncertainty arises in respect of approved drivers who do not work on a regular basis, or may "float" from car to car or even company to company. It is not at all clear that, now, anyone will be able to establish, on the balance of probabilities, who meets the Board's usual 30/30 test. How then should we decide who is properly included on the employee list - bearing in mind that we must ascertain the complement of dependent contractors as of the fall of 1984.

108. As we understand it, the existing lists proposed by the employers include not only the "floaters" *eligible* to drive but who may not *in fact* have driven in the month preceding and following the terminal date, but also the non-driving brokers who are also eligible to drive but have not actually done so. For reasons outlined above, we think that the non-driving brokers should be purged from the list; and while it is understandable that, in response to the Board's earlier decision the respondents would cast their net as broadly as possible, in order to identify all drivers with a *potential* interest in the application, we do not think that mere *eligibility* to drive or possession of the requisite licences establishes membership in the bargaining unit for certification purposes. To the extent that there is no *positive evidence* that the drivers *eligible* to work were either actually at work on the application date, or worked at least once, in the month before and month after the application date, we do not think they should be included on the list. Their mere *availability* for work is not enough.

109. As we understand it, the union's proposed employee lists are based upon two sources of information. In the first place, the union has included all drivers who have signed membership

cards on the not unreasonable assumption that they were actively working at or around the time the application was made. Secondly, when the “list problem” first surfaced, the union approached as many broker-drivers and lessee-drivers as possible to inquire of them who was working in their cars on the application date or in the month immediately preceding or following it. That inquiry may well have been incomplete but it has the advantage of being more or less contemporaneous with the filing of the application and therefore more likely to yield reliable results than the employers’ approach of listing all individuals eligible to drive or available for work, (whether they actually worked or not), or asking broker or lessee drivers to give their best recollection of who was driving with them at or around the application date some years ago. The union’s list is roughly analogous to a business record - undoubtedly hearsay, but potentially useful because it was compiled within the relevant time frame.

110. In this unique labour relations context, and given the passage of time, there is no perfect solution from a practical labour relations point of view, because even if the Board (or its Officers) questioned all principal limousine drivers (perhaps several hundred witnesses), there is no guarantee that they would have a reliable recollection of the persons driving their cars in or around the application date more than three years ago. It will be remembered that everyone in this context considers himself/herself to be self-employed, and it is by no means clear that there are reliable records which will resolve the practical, labour relations, and statutory interpretation problems posed by this case. But these are difficulties inherent in the concept of the dependent contractor itself. What this case does illustrate is that in future “taxi cases” there must be an early and wide-sweeping effort to secure, copy and retain whatever documentary evidence may exist, lest the time taken to litigate the dependent contractor question and fading recollections frustrate the certification process entirely. Furthermore, in light of the experience gleaned from this case, (and subject to resource considerations) in future cases it may well be appropriate to designate a number of Board Officers to conduct an *immediate* enquiry of the drivers’ work pattern - regardless of whether their status is in dispute, or they may ultimately be found to be “independent” or “dependent contractors”. That was not requested by the union in this case, but, in retrospect, may be the best way to avoid the mechanical problems still before us.

111. On balance (*but without finally deciding the matter*), we are inclined to find considerable merit in the union’s proposal about how the “employee” lists should be determined. The employers earlier claimed that they had no employees at all, refused to provide any list of possible employees, and maintained that they had no reliable means of establishing an employee list. They continue to maintain - rightly we think - that they really cannot know which approved drivers may be driving for them at any particular time. On the other hand, the union claims that it does, based upon its own inquiries at the time the certification application was made; and while the results of those inquiries are hearsay, it may well be that they are the best evidence now available. In the absence of affirmative evidence to the contrary, and with appropriate confirmation of method, the list proposed by the union has real attraction.

112. However, given the way in which this case has developed, and the rather unusual situation in which neither the union nor the employer are able to “pin down”, with precision, the list of drivers affected, we make no final determination at this stage. Perhaps, as the union suggests in its written submissions, there are driver “run sheets” or licence records which will help clarify the issue. If that is so, the Board will take such steps and issue such directions as are necessary to produce this documentary evidence. But, in the absence of such positive evidence, we are not inclined to embark upon an inquiry of the large pool of pure drivers, or put much weight on their present memory of whether they were working at or around the time the certification applications were filed.

113. This case is hereby referred back to the Officer for further consideration by the parties, in light of our comments. The parties are directed to assemble all documentary or other evidence in respect of their respective positions on the "list problem" and share such evidence with the opposite party. If the list cannot be resolved in this way, the Board will schedule a further hearing to address that issue. At that hearing, the union may be required to elaborate upon its inquiries, and the employer may be required to establish why its proposed list is more likely to be accurate than the list proposed by the union.

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**1931-87-U Local 27, United Brotherhood of Carpenters and Joiners of America, Complainant v. Local 183, Labourers International Union of North America, Bay-Tower Homes Company Ltd., Bay-Tower Management Inc., Ledi Properties Inc., 518270 Ontario Limited, 554614 Ontario Limited, Respondents**

**Charter of Rights and Freedoms - Collective Agreement - Construction Industry - Picketing - Remedies - Strike - Unfair Labour Practice - Voluntary Recognition - Picket lines set up by Labourers Union causing members of Carpenters Union to engage in an unlawful strike - Employers struck deciding to sign collective agreements with Labourers Union - Whether a union in a legal strike position can picket other companies at geographically distinct sites when those companies are not assisting the employer with the performance of any of the struck work - Restricting picketing would be a reasonable limit within the meaning of the Charter - Picketing found to be in breach of the Act - Purpose of picketing was to induce employers to grant bargaining rights to Labourers Union - Board granting declaratory relief only - Collective agreements not nullified**

**BEFORE:** *Robert Herman*, Vice-Chair, and Board Members *C. A. Ballentine* and *W. N. Fraser*.

**APPEARANCES:** *David McKee* and *Luis Camara* for the applicant; *C.M. Mitchell* for the respondent Local 183, Labourers International Union of North America; no one for the respondent companies.

#### **DECISION OF THE BOARD; March 28, 1988**

1. In this complaint under section 89 of the *Labour Relations Act*, the Board is asked to decide whether a union in a legal strike position can picket other companies at geographically distinct sites when those companies are not assisting the employer with the performance of any of the struck work.

2. Labourers Local 183 (hereinafter "Labourers" or "Local 183") acquired bargaining rights with respect to 518270 Ontario Limited (hereinafter "518270") in a decision of the Board dated September 4, 1986. At the time, 518270 was involved in constructing residential houses on a site in Scarborough, Ontario. 518270 is fifty per cent owned by the wife of Arthur Saccoccia and fifty per cent owned by the wife of Joseph Wolf. Notwithstanding that the wives are the registered owners, we are satisfied that for all practical purposes this company is controlled and operated by Arthur Saccoccia and Joseph Wolf, and their wives take no active role in the operation of the company.

3. Local 183 acquired its bargaining rights with respect to this company through a rather



tortuous route. In an application dated October 11, 1985, Local 183 applied to be certified with respect to four companies, none of which included 518270. This initial application for certification sought bargaining rights with respect to Bay-Tower Homes Company Ltd. (hereinafter "Bay-Tower Homes"), Bay-Tower Management Limited (hereinafter "Bay-Tower Management"), Ledi Properties Inc. (hereinafter "Ledi"), and 554614 Ontario Ltd. (hereinafter "554614"). Bargaining rights were sought with respect to construction occurring on the same Scarborough residential housing project that Local 183 subsequently obtained bargaining rights for with respect to 518270. In the original application for certification, naming only the other four companies, the applicant specifically relied upon the provisions of sections 1(4) and 63 of the *Labour Relations Act*. One of the four named companies filed a reply, denying that the provisions of section 1(4) and 63 of the Act had application. In a decision dated October 30, 1985, the Board noted that the application was withdrawn by leave of the Board.

4. Then in an application dated March 19, 1986, Local 183 applied with respect to the same construction site, this time naming only Bay-Tower Homes as respondent employer. No reference was made in this second certification application to the provisions of sections 1(4) or 63 of the Act. The Board issued a decision, dated April 11, 1986, certifying Local 183 with respect to Bay-Tower Homes. That certificate was subsequently revoked on April 24, 1986, in response to representations from the respondent, and a Board Officer was appointed to enquire into the composition of the bargaining unit. A request was thereafter received from counsel for Local 183, asking that the application be amended to change the name of the respondent from Bay-Tower Homes to Bay-Tower Management. A hearing was held with respect to this request to amend the name of the respondent, and at that hearing Local 183 changed its position and requested that the name of the respondent in the application be amended from Bay-Tower Homes to 518270, and not as previously requested, to Bay-Tower Management. The Board subsequently directed that the application be amended to substitute 518270 for Bay-Tower Homes as the respondent.

5. In this application, the second certification application brought with respect to the Scarborough construction site, Bay-Tower Homes filed a reply indicating that it had employees working on site. This reply was filed prior to the applicant Labourers' request that the name of the respondent be amended to 518270. Consequent upon the Board directing the requested amendment, 518270, now the employer respondent in the proceeding, filed its own reply indicating that it was involved in house construction on the same site as Bay-Tower Homes and indicating that it too had employees working on site. Although Local 183 was thereby put on clear notice that Bay-Tower Homes had employees on site, no reference was made to or reliance sought upon sections 1(4) or 63 of the Act, nor did Local 183 seek bargaining rights, subsequent to its amendment request, with respect to Bay-Tower Homes. Local 183 was certified to represent a bargaining unit of employees of 518270 in a decision dated September 4, 1986.

6. As noted 518270 is fifty per cent owned by Saccoccia's wife and fifty per cent owned by Wolf's wife. Saccoccia and Wolf themselves each own fifty per cent of Bay-Tower Homes. Bay-Tower Management is one hundred per cent owned by Wolf, and Ledi is one hundred per cent owned by Saccoccia. 554614 is one hundred per cent owned by Wolf's son, David. Notwithstanding the different legal ownership, all five companies are effectively managed, controlled and directed by Saccoccia and Wolf, with no active involvement by either Wolf's son or either of their wives. This control over the affairs of the five companies includes control and direction with respect to labour relations matters. All five companies have been involved in residential housing construction. Which of the five might be involved in a particular housing project varied, but regardless of which companies were involved, the same contractors and sub-contractors were retained. We are satisfied that the five companies carry on associated or related activities or businesses, under the common control and direction of Saccoccia and Wolf. Parenthetically we note that no request was

made of the Board pursuant to section 1(4) of the Act in the proceeding before us. In any event, although the conditions precedent to the exercise of our discretion pursuant to section 1(4) have been met, we would not necessarily grant such a declaration had it been requested. That determination depends on whether the Board considers it appropriate to so declare, having regard to all the circumstances.

7. In February or March of 1987, representatives of Local 183 met with Wolf and Saccoccia. The representatives advised Wolf and Saccoccia that Local 183 was in a legal strike position with respect to 518270, and Local 183 wanted to sign collective agreements for all the companies of Saccoccia and Wolf, covering labourers' and carpenters' work. Nothing concrete resulted from this first meeting, other than Saccoccia and Wolf being made aware of Local 183's position, and Local 183 being advised that Wolf and Saccoccia were not prepared to sign the requested agreements.

8. The next meeting between Local 183 representatives and Wolf and Saccoccia took place in April or May of 1987. The Labourers again indicated that they wanted to sign up the Wolf and Saccoccia companies, and that any such agreements must include a "no subcontracting" clause whereby the employer would agree to sublet work in basement forming, concrete and drain, and frame carpentry only to contractors in contractual relations with the Labourers. By the end of this meeting, Wolf and Saccoccia were prepared to sign collective agreements with Local 183 with respect to all five companies (not only 518270 for which Local 183 had bargaining rights), but only if the collective agreements did not include the "no subcontracting" clause. This position was unacceptable to Local 183 and the meeting adjourned without the participants reaching agreement.

9. A final meeting took place in early August of 1987. At that point, Local 183 had become aware that a new construction project at Morningside and Finch was either shortly to commence or had just commenced. At this meeting, Local 183 insisted again on the "no subcontracting" clause, and Wolf and Saccoccia initially remained resistant to signing agreements containing such clauses. Local 183 representatives indicated to Wolf and Saccoccia that if they didn't sign the agreements Local 183 would close down their construction site at Morningside and Finch. The participants discussed signing agreements containing a specific time exemption for the implementation of the "no subcontracting" clause, with the clause to take effect some specified time in the future. Wolf and Saccoccia wanted to at least ensure that the "no subcontracting" clause would not be effective until after completion of the Morningside and Finch project. They indicated they were willing to sign agreements exempting the application of the "no subcontracting" clause for a period of two years. Local 183 was not prepared to agree to such a lengthy exemption period. Both sides were willing to sign agreements containing an exemption clause, but nothing was finalized at this meeting.

10. The discussions at all three meetings, including the final meeting in August 1987, focused on Local 183's demand that Wolf and Saccoccia sign agreements with respect to all five companies, and not only 518270 for which Local 183 had bargaining rights. As the witnesses for Local 183 testified, Local 183 was interested in signing agreements with respect to "Bay-Tower", the real business of Wolf and Saccoccia. The Labourers did not concern themselves with the particular corporate entity for which Local 183 had bargaining rights. Nor did the representatives of Local 183 at any time enquire of Wolf and Saccoccia whether 518270 was involved in either the construction project on the Morningside and Finch site or any other project. In the Labourers' view, even though Local 183 was only certified with respect to the one company, the real enterprise was Wolf and Saccoccia (or Bay-Tower), and the respondents' corporate structure was irrelevant.

11. Representatives of Local 183 concluded that the negotiating sessions with Wolf and Sac-



coccia were not going to result in signed agreements soon enough, given that the project at Morningside and Finch had already commenced. Local 183 therefore set up a picket line around the Morningside and Finch site in the latter days of August, 1987. Thirty to fifty members of Local 183 picketed, obstructing traffic and trying to discourage vehicles or individuals from crossing the picket line. We are satisfied that the picket line effectively caused employees not to report for work though scheduled and required to report. Some of these employees were members of Local 183 working for subcontractors on the site.

12. Although Saccoccia testified that Bay-Tower Homes and Ledi were the only companies constructing houses on site, Bay-Tower Homes and Bay-Tower Management brought an application under section 135 of the Act, seeking to obtain, *inter alia*, cease and desist orders and directions that the picketing stop. In this application, Bay-Tower Homes and Bay-Tower Management claimed that Ledi and 554614 were also present and constructing on the site. We are satisfied that the four companies, for which Local 183 did not have bargaining rights, were building on the project. Only 518270 was not present and constructing at the Morningside and Finch project. The complainant Carpenters Local 27 also filed an application under section 135, requesting (*inter alia*) that the picket line be terminated.

13. Following several days of hearing in late August, 1987, during which the picket line continued, the section 135 applications brought by the companies and Carpenters Local 27 were both withdrawn. With respect to the companies' application, it was withdrawn on the basis of an agreement struck between Local 183 and all five employers, in which all five of the companies signed collective agreements with Local 183. All the agreements contained the "no subcontracting" clause, but with an additional clause stating that the "no subcontracting" clause would not be effective until January 1, 1989. Local 27 of the Carpenters withdrew its application without prejudice to its right to bring a subsequent complaint pursuant to section 89 of the Act, the very complaint before this panel.

14. Although the companies do carry on associated or related activities under common control and direction, we are not satisfied, though urged upon us by counsel for Local 183, that the companies are "functionally integrated", or effectively the same single employer, or constitute the real commercial enterprise involved (as it was variously described by the parties). The significance of these labels is that the judicial decisions of relevance, both Canadian and American, apply these labels and generally decline to enjoin picketing where the court or tribunal concludes that the picketed employer is, to use one label, functionally integrated with the primary employer. (See, for example: *Lescar Construction Co. Ltd. v. Wigman*, [1969] 2 O.R. 846; *Commonwealth Holiday Inns of Canada Ltd. v. Sundry et al*, [1974] 2 O.R. (2d) 601; *Alex Henry & Son Ltd. v. Gale et al*, (1976) 14 O.R. (2d) 311; *Williams et al v. Aristocratic Restaurants (1947) Ltd.*, [1951] 3 D.L.R. 769; *Nedco Ltd. v. Nichols et al*, [1973] 3 O.R. 944 and *Nedco Ltd. v. Clark and all other members of Communications Workers of Canada, Local No.4*, [1973] CLLC 184; *Refrigeration Supplies Co. Ltd. v. Laverne Ellis et al*, [1970] CLLC 188; *Sasso Disposal Ltd. v. Webster et al*, (1975) 10 O.R. (2d) 304; *Tenen Investments Limited v. Wueller et al*, (1966) CLLC 576; *Inglis Ltd. v. Rao et al*, (1974) 2 O.R. (2d) 525; *Seaboard Advertising Co. Ltd. v. Sheet Metal Workers International Ass'n, Local 280 et al*, (1971) CLLC 399; *Tatham Co. Ltd. v. Blackburn et al*, (1975) 9 O.R. (2d) 570). While all five companies were under the common direction and control of Wolf and Saccoccia, with no active or real control by any other individual, it is not clear on the evidence before us that the five employers are functionally integrated and represent part of the same commercial enterprise. We heard that all five companies, at different times, were involved in the construction of single family dwellings. At any given time a number of the companies would be involved on the same construction project. However, we received no evidence of the respective work forces of each of the companies, nor any evidence or suggestion that employees ever interacted with or transferred



or exchanged between the companies. To the contrary, the replies filed in the certification application indicated that at the same construction project in Scarborough, both Bay-Tower Homes and 518270 had their own respective work forces. We also had no evidence, beyond that already set out, as to whether any of the five companies are involved in other than housing construction projects with each other, nor was there any evidence that any of the four companies other than 518270 was in any way created or set up in order to defeat the bargaining rights of the Labourers with respect to 518270. Indeed, all four companies existed before Local 183 acquired bargaining rights for 518270. Some or all of the five companies would together engage in construction projects building residential houses. In this sense they were engaged at least on occasion in parallel businesses. But on the evidence we are not prepared to say that the businesses are functionally integrated, nor can we say that the work that 518270 would ordinarily have performed was being performed by any or all of the four companies at the construction site at Morningside and Finch. Local 183 was indifferent to whether or not the work 518270 would ordinarily perform was being performed either by 518270 itself or by the other four companies at the site in question. Local 183 was pursuing a course of pressuring Wolf and Saccoccia to sign agreements with respect to all five companies, regardless of whether Local 183 had bargaining rights for them.

15. Carpenters Local 27 complains that Local 183 has breached sections 70 and 74 of the Act in its conduct of setting up a picket line at Morningside and Finch, a site where the employer for which it had bargaining rights was not present and not carrying on business. Local 27 also argues that the four companies building on site were not performing any of the work that 518270 would ordinarily perform, nor assisting in any fashion so as to bring them within the “ally doctrine” under which the Board in prior decisions has declined to prohibit picketing at other than the primary site. Local 27 argues that it is only in situations where the employers being picketed are performing struck work or assisting the primary employer with respect to its business that the Board will allow picketing of other than the primary employer. Where a union cannot establish that any assistance of this nature is being provided to the primary employer, as in the instant case, Local 27 argues that picketing at geographically distinct sites is not permissible even when the employers at such sites are effectively controlled by the same individuals who control or own the primary employer. Local 27 submits that sanctioning of such picketing would undercut the provisions of section 1(4) of the Act and the provisions for applying for certification. Picketing ought not to be permitted as an alternative method of acquiring bargaining rights. In Local 27’s submission, it was incumbent upon Local 183 to either apply for bargaining rights with respect to any of the other four companies, or apply pursuant to section 1(4) of the Act for those bargaining rights, and failing such application, Local 183 cannot be allowed to set up a picket line for recognition purposes.

16. Local 183 begins by arguing that picketing must now be taken to be a constitutionally protected activity, in light of the decision of the Supreme Court of Canada in *Retail, Wholesale and Department Store Union, Local 580 et al v. Dolphin Delivery Ltd.* (1986), 33 D.L.R. (4th) 174. Any restrictions on the right of unions to picket, in the absence of picket line misconduct (and no misconduct on the line is alleged), must now be assessed in light of the constitutionally protected nature of the activity. Local 183 points to the provisions of section 76 of the Act, and particularly section 76(2). It argues that since it was in a legal strike position with respect to 518270, and therefore entitled to picket 518270, it was also entitled to picket other legal entities which are functionally integrated with the struck employer, or put differently, part of the same commercial enterprise encompassing the struck employer. Local 183 denies that the purpose of the picketing was to pressure the companies for which it did not have bargaining rights to sign collective agreements, but rather the purpose was to obtain collective agreements with respect to the real and functional employer in question. In counsel’s submissions, this was neither recognition picketing nor a recognition strike, as Wolf and Saccoccia were in fact the real employers in question, and Local 183 was simply negotiating with and ultimately picketing the real functional employer (Wolf and Saccoc-

cia), regardless of the corporate vehicle used to build the houses on a particular project. Counsel also argued on the facts that no recognition picketing had occurred, since Wolf and Saccoccia had agreed to recognize Local 183 with respect to all five of their companies, and had agreed to sign collective agreements with Local 183, prior to any picketing having occurred. Since Wolf and Saccoccia had clearly indicated a willingness to sign agreements, prior to the picketing, the picketing did not constitute an attempt to pressure them to recognize Local 183 as bargaining agent for the four companies, but merely an attempt to pressure them to agree to a particular clause in the collective agreements. In these circumstances, argued counsel, the picketing could not be characterized as constituting a recognition strike. Alternatively, even if the picketing was found by the Board to be a recognition strike, such picketing must be considered permissible in that it arose "in connection with a lawful strike" within the meaning of those words in section 76(2) of the Act, and in light of the recent Supreme Court of Canada pronouncement that such activity is constitutionally protected. Prior Board's decisions holding that such strikes were unlawful must be reconsidered in light of the recent Supreme Court of Canada pronouncement.

17. The applicable sections of the Act read as follows:

1.-(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

74. No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.

76.-(1) No person shall do any act if he knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

(2) Subsection (1) does not apply to any act done in connection with a lawful strike or lawful lock-out.

135.-(1) Where, on the complaint of an interested person, trade union, council of trade unions or employers' organization, the Board is satisfied that a trade union or council of trade unions called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union or council of trade unions counselled or procured or supported or encouraged an unlawful strike or threatened an unlawful strike, or that employees engaged in or threatened to engage in an unlawful strike or any person has done or is threatening to do any act that the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike, it may direct what action, if any, a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.

18. Two important questions arise for the consideration of the Board in the instant case. First, the Board is asked to decide whether picketing of a geographically distinct site is permissible where the companies active on the picketed site are related to the primary employer, but not performing any of the struck work or falling within the parameters of the ally doctrine. Second, should



a breach be found with respect to such picketing activity, what are the appropriate remedies that should be directed at the request of another union active on the site in question, but whose bargaining or other representational rights have not been affected by the picketing behaviour of which complaint is made.

19. The three major Board decisions on point are all of recent vintage: *Sarnia Construction Association* [1982] OLRB Rep. June 922, *Consolidated-Bathurst Packaging Limited* [1982] OLRB Rep. Sept. 1274, and *Bird Construction Company Limited* [1985] OLRB Rep. March 359. While there are major distinguishing features in each of these cases, they set out the approach taken by the Board when dealing with picketing issues. In *Sarnia Construction Association*, the Board sketched that approach as follows:

9. Sections 74 and 76 do deal with the concept of picketing but do not mention it specifically. See Laskin, *The Labour Relations Amendment Act, 1960*, (1961-62), 14 U.T.L.J. 116 at 120. It is well recognized in this province that a picket line can cause an unlawful strike within the meaning of the Act. See *Nelson Crushed Stone*, [1977] OLRB Rep. Nov. 713. See also *Local 273, International Longshoremen's Ass'n v. Maritime Employers' Ass'n*, [1979] 1 S.C.R. 120 and Note, *Whether Honouring Picket Lines Constitutes a "Strike"* (1979), 11 Ottawa Law Review 771. There is no argument or evidence before us that the activity of those employees who recognized the respondent's picket lines was anything other than concerted or based on a common understanding within the meaning of the legislation. We are therefore prepared to find that the actions of these craft employees constitute an unlawful strike within the meaning of the Act in that the procedural condition precedents to calling a timely and otherwise lawful province-wide strike under the statute had not been complied with prior to the work refusals in question. It goes without saying that this finding is only for the purpose of this application. The application was not brought against such employees and there is therefore no need to decide whether our discretion under section 135 ought to be exercised with respect to them having regard to all of the industrial relations circumstances. See *Canadian Elevator Manufacturers* [1975] OLRB Rep. Nov. 868 at para. 15. This then raises the question of whether the respondent can rely upon section 76(2) by arguing that the picket lines are in connection with a lawful strike and therefore protected.

The issue before us is similar, in that the respondent Local 183 relies upon section 76(2) and argues that the picket line around the Morningside and Finch site was "in connection with a lawful strike" and therefore ought not to be found to have breached the Act. The Board in *Sarnia Construction Association* continued:

10. We are satisfied that sections 74 and 76 are designed to deal with, among other things, picketing aimed at employers and employees wholly unconnected with a lawful strike. On the other hand, subsection 2 of 76 is aimed at permitting, among other things, picketing arising out of and related to a lawful strike. Some integrating and melding of purpose is therefore required in applying these various sections. Industrial relations experience has proven that neither purpose can be pursued to the exclusion of the other particularly in light of customs, practices and psychology surrounding the activity of picketing. Subsection 2 clearly protects, for example, picketing at a single employer location such as a plant or manufacturing setting where certain employees of the employer are on strike and picketing is aimed at fellow employees, suppliers, customers and others providing services to the struck enterprise. The Board has gone even further holding that picketing by employees on a lawful strike is permissible at locations of their employer other than the location at which they are employed. See *Canteen of Canada Limited*, *supra*, and *George Wimpey (Canada) Limited*, *supra*. Whether or not this approach has been too sweeping in its terms we do not need to decide on the facts before us. The causes for picketing are also infinite in variety as is the commercial activity which attracts picketing. Accordingly, broad general pronouncements are not very appropriate. See, for example, *Local 761, I.U.E. v. N.L.R.B.* (1961), 48 LRRM 2210; *Sailors' Union of the Pacific (Moore Drydock Co.)* (1950), 27 LRRM 1109; and Beatty, *Secondary Boycotts: A Functional Analysis* (1974), 52 Can. Bar Rev. 388. The transfer of struck work from one location to another may present compelling reasons for expansive picketing whereas the picketing of another location involved in a totally different activity might have to stand or fall on the rationale that employees are entitled to picket an



employer's entire economic domain. See *Williams v. Aristocratic Restaurants Ltd.*, [1951] S.C.R. 762; Brown, *Picketing: Canadian Courts and The Labour Relations Board of British Columbia* (1981), 31 U.T.L.J. 153. On the other hand, there can be little doubt that direct employee picketing of a geographically removed secondary employer's premises is not protected by section 76(2) subject possibly to considerations of a roving primary sites or ally considerations. See *Wescraft Manufacturing Ltd.*, [1975] 2 Can. LRBR 324 and Paterson, *Union Secondary Conduct: A Comparative Study of the American and Ontario Positions*, (1973), 8 U.B.C. Law Rev. 77 at 81. While it may be that a clearly secondary and uninvolved employer can come before this Board for a direction to require his employees to cross the picket lines, such a remedy is not always entirely adequate particularly in relation to suppliers and others and we see little justification for placing the employees of a secondary employer in the dilemma of choosing between their loyalty to the labour movement and their legal obligations. Section 76 was designed to remove the source of the problem, i.e. employee directed secondary picketing. See Arthurs, *Labour Law-Secondary Picketing-Per Se Illegality-Public Policy* (1963), 41 Can. Bar Rev. 573 at 584. It is only since the expansion of the Board's remedial authority that the problem has become one falling within the Board's responsibility. In this respect, we think the reliance of *Canteen of Canada Ltd.* in *Ford Motor Co. of Canada Ltd. v. Browning* (1978), 86 D.L.R. (3d) 579 at 581 was understandable but not warranted. Accordingly, *Canteen of Canada* must be read in light of the instant decision.

20. In *Consolidated-Bathurst Packaging Limited (supra)*, the Board wrote as follows:

22. Section 74 and 92 must be interpreted in the context of the other provisions of the statute and of industrial relations practices. Similarly, the Board's discretion under section 92 must be exercised in the light of these same considerations. It is from this perspective that the Board has said that section 74 must be read and applied with due regard to the legislation [sic] policy expressed in section 76. See *Canteen of Canada Limited*, [1978] OLRB Rep. Mar. 207. Picketing is a traditional method employed by workers to publicize their employment disputes and to attract support. If section 74 was applied literally by this Board, picketing at their workplace by employees lawfully on strike would be restrained if honoured by other employees of the struck employer or by the employees of suppliers providing goods and services to the struck location. Section 76(1) is aimed more broadly and directly at picketing in that it applies to "persons" as opposed to trade union officials and requires only the finding that persons will engage in an unlawful strike as the probable and reasonable consequence of the picketing and not that an unlawful strike has occurred. However, by section 76(2) the Legislature has made it clear that it does not intend to restrain picketing done "in connection with a lawful strike". In other words, accommodation is made for the traditional exercise of picketing conduct. This Board has therefore read section 74 in light of section 76(2) and declined to restrain, under either section 92 or 135, the involvement of union officials in picketing properly associated with a lawful strike. This case, like *Sarnia Construction Association*, raises the issue of the scope of picketing envisaged and permitted under the Act. Is this picketing in connection with a lawful strike within the meaning of the Act?

23. Ontario has not chosen to provide a detailed code for picketing such as exists in the Province of British Columbia. Rather, more like the *National Labor Relations Act*, the Act begins with the premise that all actions causing unlawful strikes are themselves unlawful and then a very general exemption is provided for "any act done in connection with a lawful strike" to accommodate labour's traditional exercise of picketing activity. Prior to the enactment of section 20 of the *Judicature Act* and the Board's cease and desist remedial jurisdiction, section 76(2) was largely irrelevant. Ex parte, interim and final injunctive relief was available in the courts in actions brought against picketers and framed in common law terms. Section 76(2) simply was a defence to a prosecution under the Act but was not seen as founding a positive statutory right. However, the courts did try to rationalize common law tort and contract laws with lawful strike action and important accommodations were made for picketing arising out of an otherwise lawful strike and confined to the primary work location. See *Tenen Investments Ltd. v. Wueller* (1966), 66 CLLC ¶14,151; *Lescar Construction Co. Ltd. v. Wigman*, [1969] 20 O.R. 846; *Refrigeration Supplies Co. Ltd. v. Ellis et al* (1970), 14 D.L.R. (3d) 682; *Falconbridge Nickel Mines Ltd. v. Tye, Boundreau, et al* (1971), 71 CLLC ¶14,101. Secondary picketing - the picketing of an innocent third party to a labour dispute - was clearly unlawful both at common law and under the *Labour Relations Act*. See *Hersees of Woodstock Ltd. v. Goldstein et al*, [1963] 2 O.R. 81.

24. However, the situation in the courts with respect to labour relations conflict was significantly affected by the passage of section 20 of the *Judicature Act*. This enactment sets down stringent rules for the availability of injunctive relief in a labour dispute. "Labour dispute" is defined very broadly and, in such a dispute, an injunction is only available if the court is satisfied "that reasonable efforts to obtain police assistance, protection and action to prevent or remove any alleged danger of damage to property, injury to persons, obstruction of or interference with lawful entry upon or exit from the premises in question or breach of the peace have been unsuccessful". See the *Judicature Act* R.S.O. 1980, C. 223 as amended s. 20(e). The history behind this section bears some resemblance to the forces in the United States giving rise to the *Clayton Act of 1914* and the *Norris-LaGuardia Act* of 1932. However, Ontario courts have had to interpret the meaning of "labour dispute" to determine the application of section 20 and have held that picketing directed at neutral third parties or at employers not connected with a labour dispute falls outside the section and is amenable to injunctive relief. But in so holding, the courts have tried to ensure that an applicant has not involved himself in a labour dispute. See *Commonwealth Holiday Inns of Canada v. Sunday et al*, [1974] 2 O.R. (2d) 601; *Alex Henry & Son Ltd. v. Gale et al*, [1976] 14 O.R. (2d) 311; and, generally, Beatty, *Secondary Boycotts: A Functional Analysis* (1974), 52 Can. Bar Rev. 388.

25. At the very time the courts were being restrained in their involvement in labour disputes, this Board was being given more extensive remedial powers to control and regulate all forms of industrial relations conflict. Indeed, this jurisdiction was recognized by the court with respect to picketing. See *Nadrofsky Steel Erecting Ltd. v. Doyle* [1973] 30 R. 515, 37 D.L.R. (3d) 343. In the case of picketing, general substantive guidelines were already in place and this new remedial jurisdiction therefore provided the labour relations community with an alternative forum to the courts. The Board's substantive mandate clearly differs from that of the courts and it cannot be said the two jurisdictions are congruent. For example, see the outcome of *Sarnia Construction Association*, *supra*. However, cases decided under section 20 of the *Judicature Act* involve a somewhat similar balance of competing factors and can provide useful guides in particular cases. This Board is obligated to determine whether "the act done" (i.e. picketing) is "in connection with a lawful strike". One interpretation might be that as long as the picketers are on lawful strike somewhere in Ontario they can picket anyone and anywhere else without restriction by this Board. We do not, however, believe that the Legislature intended to insulate picketing to this extreme extent. Rather, the emphasis of section 76(1) is on affording positive protection against picketing. Reading subsection (1) and (2) together, we believe the Legislature intended to protect innocent third parties from the effects of labour disputes while, at the same time, accommodating the traditional actions of employees involved in lawful strike action, i.e. picketing. To use the classic jargon of this area of labour relations, the Legislature has attempted to maintain a balance between the rights of unions to engage in primary activity and the rights of secondary employers to remain free from the direct involvement in the disputes of others. A similar balance arises out of the secondary boycott provisions of the *National Labor Relations Act* in the United States wherein section 8(b)(4)(B) prohibits secondary boycotts, as Senator Taft put it, "to injure the businesses of a third person who is wholly unconcerned in the disagreement between an employer and his employees." See 93 Cong. Rec. 4198 (1947); *Levin*, *supra*, page 285. It has been for the NLRB to determine whether any particular employer, complaining of unlawful secondary boycott activity, is in fact wholly unconcerned. Exercising a somewhat analogous function, this Board is required to determine whether particular actions complained of are done in connection with a lawful strike understanding that s. 76(2) does not sanction action directed at a person or employer wholly unconcerned in a disagreement between another employer and his employees. Picketing directed at a neutral third party is not in connection with a lawful strike occurring between other parties within the meaning of the subsection. Such actions may, depending on the circumstances, violate both sections 76(1) and 74 and can be remedied under sections 89 and 92.

26. Thus, in *Sarnia Construction Association*, *supra*, the Board found that picketing at construction sites by a striking trade union when the work of the trade was not being performed could only have the purpose of being aimed at employers and employees unconnected with the dispute except by geographical proximity. Accordingly, from this viewpoint, the Board ruled that the picketing was not in connection with a lawful strike and instructed that gates be erected for the employees of these neutral employers. The striking trade was prohibited from picketing these gates as long as their work was not being performed.



27. In this case we must also determine whether the applicant is truly a neutral party. In the United States “the ally doctrine” was developed under section 8(b)(4)(B) to characterize third parties who had involved themselves in a labour dispute of others and who were therefore not entitled to the protection of the secondary boycott provision. For example, if a struck employer hires strike breakers, these persons can clearly and properly be subjected to picketing. If the struck employer instead contracts out his struck work to another employer at premises remote from the dispute, to preclude the striking employees from picketing at the new location where the work is being performed would render the strike right illusory. Moreover, the secondary employer who receives the struck work is obviously not an innocent bystander for whom either 8(b)(4)(B) of the *National Labor Relations Act* or s. 76(1) and S.74 of the *Labour Relations Act* were designed. Such a secondary employer is therefore to be viewed as standing in the shoes of the primary employer and is a proper target for picketing. Reference to this doctrine was made at paragraph 10 of the *Sarnia Construction Association* decision and it is the application of this doctrine that is in issue in the facts at hand. A review of a number of cases relied on by the respondents provides a useful prelude to the characterization of the applicant as either a neutral or an ally.

21. Since some of the employees of at least some of the subcontractors working on site declined to cross the picket line set up by Local 183, though required under their respective collective agreements to work on the days in question, we are satisfied that those employees were engaged in unlawful strikes. Those employees included members of Local 183, and we are satisfied that one of the intended results of the picket line set up and authorized by Local 183 was to cause members of the Labourers to engage in an unlawful strike. Local 183 has therefore called or authorized an unlawful strike within the meaning of section 74 of the Act. We must next consider whether 76(2) provides a defence to what would otherwise be the impermissible and illegal behaviour of Local 183. Can we say in all the circumstances that the picketing that occurred was done “in connection with a lawful strike”?

22. We first assess the effect of the decision of the Supreme Court of Canada in *Dolphin Delivery* (*supra*), wherein the Court found that the picketing conduct before it fell within the provisions of section 2(b) of the Charter, guaranteeing freedom of expression as a fundamental freedom. As Mr. Justice McIntyre noted, at page 187 of the decision:

... it is evident that the purpose of the picketing in this case was to induce a breach of contract ... and thus to exert economic pressure ... It is equally evident that, if successful, the picketing would have done serious injury to the respondent. There is nothing remarkable about this, however, because all picketing is designed to bring economic pressure on the person picketed and to cause economic loss for so long as the object of the picketing remains unfulfilled. There is, as I have earlier said, always some element of expression in picketing. The union is making a statement to the general public that it is involved in a dispute, that it is seeking to impose its will on the object of the picketing, and that it solicits the assistance of the public in honouring the picket line. Action on the part of the picketers will, of course, always accompany the expression, but not every action on the part of the picketers will be such as to alter the nature of the whole transaction and remove it from Charter protection for freedom of expression. That freedom, of course, would not extend to protect threats of violence or acts of violence. It would not protect the destruction of property, or assaults, or other clearly unlawful conduct. We need not, however, be concerned with such matters here because the picketing would have been peaceful. I am therefore of the view that the picketing sought to be restrained would have involved the exercise of the right of freedom of expression.

23. But the question before us is what limits on picketing are to be imposed, within the confines of the legislation, and not whether picketing *per se* is a protected activity. Prior decisions on point have restricted picketing, while specifically conceding for purposes of the decision that the picketing involved is part of a constitutionally protected activity, freedom of expression. For example, in *Horton CBI, Limited*, [1985] OLRB Rep. June 880, the Board was asked to consider the propriety of picketing activity, in light of the argument that picketing was constitutionally protected. As the Board therein stated:



24. Having considered the respondents' representations in the circumstances of this case, I do not think that the "Charter argument" can be accepted. Assuming, for the moment, that picketing involves an element of freedom of expression, I do not think that the *Charter* protects expressions which, as here, amount to a call or encouragement to engage in an unlawful strike. (I make no comments on the propriety of other means of communicating the respondents' concerns.) To the extent that sections 74 or 76 of the *Labour Relations Act* amounts [sic] to a restriction on such expressions, it is my view that such restriction is quite justifiable in accordance with the terms of the *Charter*. It follows, of course, that the picketing must be prohibited; however, nothing in this decision should be construed as an opinion on the merits of the respondent union's claim under section 91 of the *Labour Relations Act* should it seek to pursue that avenue of redress.

And as Mr. Justice McIntyre himself noted in the passage above from *Dolphin Delivery*, because activity involves some expression does not necessarily mean it will be protected. Threats of violence or acts of violence, for example, would not be so protected.

24. The question therefore is whether restricting the picketing activity that occurred would be a reasonable restriction or limit within the meaning of the Charter, and given the legislative framework of the *Labour Relations Act*. Local 183 argues forcefully that the restriction sought is not a reasonable limit within the meaning of the Charter. Apart from other difficulties, one concern we have with this submission of Local 183 is that this Charter argument was only raised for the first time in final submissions. Quite apart from the fact that notice of this proceeding and the raising of a Charter issue was not given to either the provincial or federal Attorneys-General (see in this regard: *F.D.V. Construction Limited*, [1986] OLRB Rep. May 617, and *Dominion Paving Limited*, [1986] OLRB Rep. July 946), as there was no notice prior to the conclusion of the evidence that the matter would be raised, we have some concern that the evidentiary context was not fully developed with respect to the scope of any reasonable limitation on picketing activity.

25. Accordingly, we will consider the propriety of the picketing in light of the provisions of the *Labour Relations Act*, and not with reference to section 1 of the Charter. We conclude that some limits on picketing are reasonable. As a general description of where we might seek to draw those limits, we agree with and adopt the approach taken by the Board in its earlier trilogy, *Sarnia Construction Association*, *Consolidated-Bathurst* and *Bird Construction*, and applied by the Ontario courts in a somewhat different context when they have considered applications pursuant to section 20 of the *Judicature Act*, or subsequently, section 115 of the *Courts of Justice Act*. That approach involves drawing the limits on picketing by attempting to protect innocent or wholly neutral third parties from the effects of the labour dispute in question, while allowing picketing which is in fact in connection with the lawful labour dispute. As the Board stated in *Consolidated-Bathurst*, (*supra*) in paragraph 25: "picketing directed at a neutral third party is not in connection with a lawful strike occurring between other parties within the meaning of the subsection. Such actions may, depending on the circumstances, violate both sections 76(1) and 74 and can be remedied under sections 89 and 92."

26. Whether Local 183 focuses its claim to the right to picket geographically distinct employers on the "functional integration" between those employers and the primary employer or on the fact those employers meet the prerequisites for the Board to consider exercising its discretion under section 1(4) of the Act is not significant in the case at hand. We need not and do not decide in the instant case whether picketing of "functionally integrated" employers is generally to be permitted. For the purposes of this complaint, we are prepared to assume, without deciding, that a union in a legal strike position is entitled to picket geographically separate premises of other employers (in the sense that the employers are separate legal entities) when those employers are either "functionally integrated" or carry on associated or related activities or businesses under common control or direction regardless of whether a section 1(4) proceeding has been brought

with respect to the picketed companies, regardless of whether the Board has made a finding pursuant to that section, and regardless of whether the employers located at the distinct site are performing any of the struck work or assisting the primary employer in any of the circumstances in which the Board would conclude that the ally doctrine would apply.

27. Assuming therefore (without deciding) that picketing of employees at distinct sites is permissible in the circumstances described in the preceding paragraph, we nevertheless conclude that the picketing before us was impermissible and a breach of the Act. The picketing at the Morningside and Finch site was not aimed predominantly at exerting pressure on the primary employer, 518270, with respect to the labour dispute Local 183 had with that employer. To the contrary, it is clear that Local 183 was picketing in order to apply pressure to the other four companies, with a view to compelling those other four companies to both grant bargaining rights to and sign collective agreements with Local 183.

28. It would be artificial to conclude that the picketing did not occur for the purpose of inducing the picketed employers to grant bargaining rights to Local 183 and to induce them to sign agreements containing the "no subcontracting" clause. The meetings between Local 183 and Wolf and Saccoccia were attempts by Local 183 to have Wolf and Saccoccia sign agreements with respect to all five companies. Local 183 was indifferent as to whether 518270 was working on the Morningside and Finch project or, indeed, as to whether that company was engaged in any project anywhere. Local 183 was intent upon getting Wolf and Saccoccia to sign agreements, which would necessarily encompass the recognition of Local 183 as having bargaining rights with respect to all the companies controlled or directed by Wolf and Saccoccia. When these two individuals refused to sign the requested agreements, a picket line was set up, without Local 183's being aware of or even asking whether 518270 was operating on site, in order to pressure all five companies into signing agreements including the "no subcontracting" clause. There had at that stage clearly been no voluntary recognition of Local 183 by the four companies being picketed. Any such recognition was made by Wolf and Saccoccia conditional upon, and without effect until, the parties agreed to the terms of the collective agreements. In these circumstances, we are satisfied that the purpose of the picketing was at least in large part to pressure the four picketed employers to sign agreements with Local 183, a union which did not hold bargaining rights with respect to those companies.

29. Picketing for this purpose constitutes a breach of sections 74 and 76(1) of the Act, and is not saved by the provisions of section 76(2) of the Act. To countenance such picketing would allow unions to circumvent the procedures contained in the Act specifically designed to deal with the acquisition of bargaining rights, through Board proceedings such as applications for certification and applications pursuant to section 1(4) of the Act.

30. A somewhat analogous case is *Horton CBI, Limited*, (*supra*). In that case a company was being picketed by a union to force it into assigning certain work to the picketing union. As the Board found, such picketing constituted a resort to economic pressure in circumstances where the picketing union was not content to follow the specific provisions within the Act for resolving disputes over jurisdictional matters. That panel of the Board decided that it was a reasonable restriction on picketing to preclude it where the picketing was being utilized in order to avoid legislative provisions specifically designed to deal with the nature of the dispute in question. The Board has also found recognition picketing to be unlawful. (See, for example, *Traugott Construction Limited*, [1981] OLRB Rep. Nov. 1680; *Traugott Construction Limited*, [1982] OLRB Rep. June 958; upheld on judicial review at 84 CLLC 12,098.)

31. For the foregoing reasons we have concluded that the picketing by Local 183 was not "in connection with a lawful strike" within the meaning of section 76(2) of the Act, in that it was



picketing in connection with attempts to pressure the picketed employers into recognizing the picketing union and signing collective agreements with it.

32. As we are satisfied Local 183 has breached section 74 of the Act, it is unnecessary for us to comment upon any possible breach of section 70, the other section relied upon by the complainant.

33. We turn lastly to consider the appropriate remedy. In a prior decision in the instant complaint, the Board (differently constituted but with the same Vice-Chair and 1 Board Member) dealt with preliminary objections as to the status or standing of Carpenters Local 27 to file the complaint ([1988] OLRB Rep. Jan. 4). In that decision, the Board wrote, in part, as follows:

5. Turning to the first preliminary objection, whether Carpenters Local 27 has standing to bring the instant complaint, we consider this issue with respect to the individual sections pleaded in the complaint. It was common ground between the parties that a complaint pursuant to section 3 cannot stand alone, and if Carpenters Local 27 has no standing pursuant to any other section of the Act, the complaint pursuant to section 3 must also be dismissed.

6. The complaint is hereby dismissed with respect to section 60. In order to have standing to bring a complaint pursuant to this section, on the explicit wording of section 60(1), the complainant must either be an employee in the bargaining unit or a trade union representing an employee in the bargaining unit. Carpenters Local 27 does not (and could not) claim to be an "employee in the bargaining unit", nor is there any suggestion in the complaint that Carpenters Local 27 represents any employees in the bargaining units covered by the collective agreements between Labourers Local 183 and any of the respondent employers. In these circumstances, we are satisfied that the complainant has no standing to file the section 60 complaint.

7. The complainant in effect withdrew the complaint pursuant to section 65, acknowledging that it was not alleging a breach of this section.

8. The complaint pursuant to section 67(2) of the Act is also dismissed, as the facts as pleaded do not disclose a *prima facie* case pursuant to this section. Section 67(2) was designed to protect the right of a trade union which has the legal right to represent employees in a bargaining unit, to represent such employees in their employment relationship without interference from other trade unions. The complain does not set out any facts suggesting that Labourers Local 183 has attempted in any way to interfere with the representation by Carpenters Local 27 of the employees represented by Local 27 with respect to the subcontractor Amarcord, the only employees that the complainant represents. In this regard, the complainant asserts, with no facts pleaded in support, that Labourers Local 183 "obtained bargaining rights aimed directly at interfering with the bargaining rights of Carpenters Local 27". (See paragraph 18 of the complaint). The mere assertion of this does not constitute a *prima facie* case. No facts are alleged suggesting how or when the complainant's bargaining rights might have been interfered with. And the fact that any or all of the respondent employers might have signed collective agreements with Labourers Local 183 in the circumstances alleged, does not of itself imply that the bargaining rights held by Carpenters Local 27 with Amarcord have in any way been affected, nor that there has been any interference with its ability to represent employees in the Amarcord bargaining unit. Nor did counsel for the complainant suggest in oral submissions how the Labourers' conduct could have interfered with those bargaining and representational rights. In these circumstances, we are satisfied that no *prima facie* case has been alleged.

9. With respect to the remaining two sections, sections 70 and 74 of the Act, the complaint in essence alleges that through activity impermissible under the Act, an illegal recognition strike, Labourers Local 183 was able to pressure the respondent employers into signing the respective collective agreements. Carpenters Local 27 alleges that the result gained by this illegal activity either has or will directly interfere with the bargaining rights held by Local 27, or alternatively (as expanded in oral submissions), interfere with the work members of Local 27 perform pursuant to the collective agreement between Local 27 and subcontractor Amarcord. Local 27 argued that precluding it from filing the instant complaint with respect to this illegal conduct would be



to sanction the illegal behaviour of Labourers Local 183 and prevent the injured party from seeking redress for any consequences.

10. Given the legal issues raised, the specific wording of sections 70 and 74 of the Act, the construction industry context, and the historical and ongoing dispute between the Carpenters and Labourers, we are not prepared at this preliminary stage to preclude Carpenters Local 27 from having this aspect of the complaint heard on its merits. Accordingly, reserving on the issue of whether Carpenters Local 27 has standing to bring the complaint pursuant to sections 70 and 74, the complaint will proceed on its merits with respect to the alleged breach of these two sections and on the basis of the material facts pleaded in the complaint with respect to the allegedly illegal strike. In light of our comments above, the complaint will also proceed with respect to section 3 of the Act.

11. The second preliminary objection as characterized by the respondent Labourers Local 183, is whether paragraph 19 of the complaint ought to be struck and whether the complainant ought to be precluded from raising the matters set out in that paragraph. Both parties made lengthy submissions on this matter but we do not consider it necessary to set them out here. Suffice to say that Labourers Local 183 submitted that the allegations and issues contained in paragraph 19 of the complaint raise the very issue that a prior panel of the Board would not allow the Carpenters to raise, on the grounds of delay and abuse of process: *Toronto Housing Labour Bureau, supra*. It is Local 183's position that it would be an even greater abuse to countenance the raising of this issue in this proceeding. In response, counsel for Carpenters Local 27 characterized paragraph 19 as more properly consisting of argument, and submitted that such matters could in fact be raised by way of argument. The Board has concluded that paragraph 19 need not be struck from the complaint. The case that the Board will hear is confined, with reference to the material facts pleaded in paragraphs 1 to 19 of the complaint, to whether Labourers Local 183 breached either or both of sections 70 and 74 of the Act. Absent a finding of such breach, no remedy can or would issue. If the Board does conclude that Labourers Local 183 has breached the Act, then Carpenters Local 27 can argue that the appropriate remedy includes a declaration that either the subcontracting provisions in the collective agreements or the collective agreements themselves are null and void. There is, however, no suggestion in the complaint that the signing of the collective agreements, whether or not there were employees in the bargaining units at the time the agreements were signed, constituted breaches of sections 70 and 74 of the act. The ambit of the case will accordingly be restricted to what is arguably relevant to the alleged breach(s) of sections 70 and 74, as particularized in the complaint, and as we have summarized in paragraph 9 above.

34. The Board reserved on the issue of whether the applicant had standing to bring the instant complaint, but directed that the case under sections 3, 70, and 74 be heard on the merits. We note that the activity being complained of (picketing) had terminated when this complaint was filed and the complainant did not allege that any of its bargaining or representational rights had been interfered with by the picketing behaviour. We also note the relief being sought by the complainant. A declaration is sought that Local 183 has violated the *Labour Relations Act*, and declarations are also sought that the collective agreements entered into between Local 183 and the four companies, other than 518270, are void and that the subcontract clause in the 518270 agreement is also void or, in the alternative, that the subcontracting restrictions in all five collective agreements are void. Local 27 does not ask that the collective agreement between 518270 and Local 183 be declared null and void (notwithstanding that it resulted from the same impermissible picketing activity), but only that the subcontract clause within it be so declared. There is no request that damages be awarded to Local 27 on behalf of any member(s) who did not report for work because of the picketing activity.

35. We will issue declaratory relief indicating that Local 183 breached the Act in its picketing activity, as discussed above. But ought we to nullify the collective agreements, or alternatively, the "no subcontracting" clauses within those agreements? None of the bargaining rights of the complainant have been affected (nor did the complainant so suggest) by the picketing activity complained of before us. Nor have any of the representational rights of Local 27 as the exclusive bar-

gaining agent of the employees of M & M Amarcord been affected by the picketing behaviour. The picketing had ceased before the instant complaint was filed. Notwithstanding that four of the employers were involved in an application under section 135 to terminate the picketing activity, and notwithstanding that the agreements were signed as part of a settlement of that application, none of the five employers in question has subsequently complained about the collective agreements which they signed with Local 183. Nor do they complain about the agreements in the proceeding before us. Indeed, though named as respondents, none of the five employers has chosen to participate in this proceeding. All five employers have adopted and acted upon those collective agreements (by, for example, forwarding the requisite deduction and contribution forms to Local 183 with respect to all five companies). Similarly, no employee who might be covered by the applicable collective agreements has sought relief from such pursuant to section 60 of the Act, wherein an employee can challenge a voluntary recognition agreement. Ought we to nullify all or part of the five collective agreements at the request of a party who cannot claim that any of its rights under the Act have been interfered with by the signing of the agreements in question?

36. In *Traugott Construction*, (*supra*), the Board would not enforce a section 124 grievance against the employer who complained that the collective agreement under which the grievance was filed resulted from illegal activity on behalf of the union. The Board there declined to enforce the agreement by declining to consider the merits of the grievance in question, but commented (at paragraph 26) that “we wish to emphasize, however, that had Traugott performed a positive act to indicate that it had accepted the working agreement, the result in the present case would have been different. Thus, had Traugott accepted the terms of the working agreement, it could not later deny such an acceptance. In the present case, however, there was no evidence of such a positive act of acceptance.” In the instant case, the employers involved have declined to seek Board intervention to nullify the agreements; they have adopted the agreements, and have conducted themselves as if they were content that the agreements remain binding. Moreover, no employee covered by the agreements has sought to challenge them.

37. We must also keep in mind the special nature of the construction industry. It is quite common for numerous subcontractors to be engaged on a particular construction project, each in a bargaining relationship with a different union. The Board must consider the appropriateness of remedial relief in light of this context, and the potential for creating an atmosphere ripe for warfare and internecine quarrelling between competing unions. Unions in this sector do obtain, through voluntary recognition, collective agreements which may preclude other unions from organizing an employer or from obtaining work from that employer. But such agreements are not *per se* illegal or improper in the construction industry (see, for example, *Nicholls-Radtke*, [1982] OLRB Rep. July 1028.) In addition to those considerations, the Board, in determining what relief may appropriately be granted to the complainant to remedy Local 183’s contravention of the Act, must also consider, amongst other matters, the nature of the breach and the interest of the party complaining about the breach. Here, the picketing activity had ceased prior to the filing of the instant complaint. The complainant is not seeking any damages for its members, such as wages lost as a result of the picket line, nor does the complainant seek to have nullified the collective agreement signed by 518270.

38. Having regard to all of the evidence, we are satisfied that Wolf and Saccoccia would voluntarily have signed collective agreements containing a “no subcontracting” clause, with respect to all five companies, had Local 183 agreed to exempt the application of the “no subcontracting” clause until the Morningside and Finch project was finished. Such an exemption clause, granting the exemption until a specific date, was in all the agreements signed after the picketing. Wolf and Saccoccia would have signed agreements prior to the picketing had they provided for an exemption of two years. The agreements eventually signed contained an exemption until January 1, 1989 and



the employers have acted upon these agreements and do not seek to challenge them. These agreements were signed because they satisfied the concerns of Wolf and Saccoccia. The picketing did not lead to agreements being signed that would not have been signed but for the impermissible activity.

39. In the circumstances of this case it appears to us that the appropriate remedy is a declaration that Local 183 breached the Act by its picketing behaviour. No compensation is requested and we need not therefore consider it. In light of the construction industry context, and given that the facts strongly suggest that the employers would have signed the agreements in question (containing a clause exempting them for a time from the application of the "no subcontracting" clause) whether or not picketing occurred and regardless of the section 135 application, and given that the complainant has not established that the agreements interfere with any of its legal rights under the Act, we decline to interfere with the operation of those agreements at the request of the complainant.

40. In line with these comments, the only remedial relief will be this decision itself, which declares that Local 183 has breached the Act, as set out above.

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**1789-87-U Michael Burkett, Mario Reale, Brian Price et al, Complainants v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local 647, Respondent v. Ault Foods Limited, Intervener**

**Duty of Fair Representation - Unfair Labour Practice - After plant closure employees moving to another facility - Seniority entailed rather than dovetailed - No breach of fair representation duty**

**BEFORE:** *Judith McCormack*, Vice-Chair.

**APPEARANCES:** *Arnold Bruner, Gordon Brian Price, Michael Burkett, Mario Reale and Frank Lu* for the complainants; *Douglas J. Wray, Milt Aylwin and Randy Doner* for the respondent; *Peter Thorup, Scott McDonald and Ernest Cousins* for the intervener.

**DECISION OF THE BOARD;** March 15, 1988

1. This is a complaint under section 89 of the *Labour Relations Act* in which it is alleged that the respondent violated section 68 by entailing the seniority of a number of employees entering a bargaining unit from another bargaining unit, rather than dovetailing the two seniority lists. The complaint was heard over the course of three days, at the end of which the Board dismissed the complaint giving oral reasons. At that time, the Board advised the parties that more formal reasons would issue at a later date.

2. This case involves a series of transactions which resulted in the intermingling of several different groups of employees. In April of 1981, the intervener, Ault Foods Limited purchased Dominion Dairies Limited which operated under the trade name of Sealtest. This purchase included three facilities, one on Walmer Road, another on Berkeley Street and a third on Garyray Drive. Employees working at these three plants were represented by the respondent by virtue of one collective agreement covering all three plants. Under that agreement, seniority was deter-



mined by virtue of five different seniority lists relating to different crafts. Ault continued to operate the three facilities until 1985. In the meantime, in September of 1983, Ault purchased Silverwood Dairies, which included two facilities, one located on Lawrence Avenue in Don Mills and another located on Dupont Street in Toronto. Employees at both locations were represented by the respondent and covered by one collective agreement. In late October of 1983, the Dupont Street facility was closed and a number of employees from that plant commenced working at the Don Mills facility. The seniority of those employees was dovetailed with that of the Don Mills employees.

3. In 1985, Ault announced the closure of the former Sealtest Walmer Road plant. Operations at the Walmer Road plant were phased out over a period of approximately one year. At that time, Walmer Road employees were given a number of options, including bumping into positions at the former Sealtest Garyray and Berkeley Street plants (although such positions were extremely limited), early retirement, termination with severance pay, or working at the former Silverwood Don Mills facility. For those employees who chose to go to the Don Mills plant, their seniority was endtailed rather than dovetailed with that of the Don Mills employees, with the result that the Walmer Road employees were offered less desirable jobs on less desirable shifts, and they continue to be more vulnerable to lay-offs.

4. The instant complaint was brought by a number of Walmer Road employees who argue that the decision to endtail their seniority was arbitrary and discriminatory given that it placed them at a disadvantage vis-a-vis the other groups of employees and that it was made in a context where the seniority of other employees had been dovetailed. Section 68 provides as follows:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

5. The Board has long recognized that it is inevitable that unions will be faced with hard choices with respect to the competing interests of different groups of employees. As a result, the Board has been cautious about substituting its own hindsight for the attempts of unions to accommodate the diverse interests and claims of the employees they represent in the context of negotiations with an employer. (See for example, *Dufferin Aggregates*, [1982] OLRB Rep. Jan. 35; *The Great Atlantic and Pacific Company Limited*, [1983] OLRB Rep. Oct. 1654.) As the Board noted in *Dufferin Aggregates*, *supra*, "[t]here is nothing inherently unlawful in a union making a decision that favours one group of employees over another". The Board has thus allowed unions considerable latitude in making choices in this regard, partly in recognition of the fact that there may be no right or wrong answer in some circumstances, but rather a series of equally problematic alternatives.

6. This case highlights that kind of dilemma. It cannot be said that the decision to endtail the seniority of the Walmer Road employees was inherently unfair or that dovetailing itself is more appropriate or reasonable. As the Board has noted previously, some inequities or unfairness may attach to either method of integrating seniority lists (see *William Geddes*, [1984] OLRB Rep. Feb. 233). And it is inevitably a situation where some employees will always be disadvantaged by and dissatisfied with whichever approach is taken. In this case, the Walmer Road employees were not covered by the collective agreement governing the Don Mills facility, but rather by the agreement covering what were formerly the Sealtest operations. As a result, they had no legal right under that agreement to transfer or bump into the Don Mills facility, let alone to have their seniority at the Walmer Road plant recognized at the Don Mills plant. However, it was obvious that both the respondent and the intervener were concerned about the Walmer Road employees, many of whom

had worked at that location for many years. As a result, the respondent and the intervener negotiated a separate transition agreement on October 3, 1985 which provided for the options described above. While it is evident that the provisions of that agreement fell short of what the complainants desired, it is also clear that it provided for a number of improvements above and beyond the limited rights they had under the Walmer Road collective agreement. Indeed, ultimately, the Walmer Road employees were given some credit for their seniority in the Walmer Road plant, and in addition were ranked on the seniority list in seniority order as between themselves, although junior to the Don Mills employees. In addition, their seniority was recognized at the Don Mills plant for the purposes of vacation and pension entitlement. A number of other provisions and conditions were agreed upon to ease the transition of employees and to minimize to the extent possible the economic consequences of the Walmer Road plant closure on employees.

7. It is apparent that a great deal of the bitterness and sense of grievance on the part of the Walmer Road employees stems from the fact that the former Silverwood Dupont Street employees had their seniority dovetailed when they were transferred into the Don Mills plant earlier. The complainants also pointed to a long line of collective agreements which were predecessors to the collective agreement covering the Walmer Road plant and which included a provision for the dovetailing of seniority where businesses were purchased or merged.

8. However, it is difficult to say that the union's decision in this context was arbitrary, discriminatory or made in bad faith. It is evident that the Walmer Road employees had very different legal rights from the Dupont employees with respect to the Don Mills facility as a result of the fact that the latter were covered by the Don Mills collective agreement and the former were not. As a result, the differential treatment of these two groups can be explained by the fact that they were differently situated with respect to their legal claims on positions at the Don Mills plant. The fact that predecessor agreements to the Walmer Road agreement contain provisions which essentially allowed the employees of purchased dairies to bump into the Walmer Road plant was of little assistance to the Walmer Road employees with respect to their legal rights vis-a-vis the Don Mills plant and the collective agreement covering that plant, even if such a provision had been retained.

9. A number of ingredients went into the respondent's decision to enttail the Walmer Road employees' seniority, including their legal position, the employer's position (originally, the employer wanted to pick and choose only those employees it wished to retain without reference to seniority) and the views of both the Walmer Road employees and the Don Mills employees with respect to the integration of seniority. It should be noted that there were more employees at the Walmer Road plant than there were at the Don Mills facility, and that the decision to enttail was not simply a question of political expediency. Having had the opportunity to hear extensive evidence in this regard, I find there was nothing improper about the factors the respondent considered, or the manner in which the decision was made.

10. The complainants argued that the general policy of the local had been dovetailing, and that in this sense, the enttailing of their seniority was discriminatory. However, the evidence before me indicates that for various reasons, and in various circumstances, different groups of employees have had their seniority both enttailed and dovetailed in the past, and it cannot be said that the enttailing of the Walmer Road employees' seniority was a departure from the local's general approach. The complainants were also concerned that four employees at the Walmer Road plant had apparently received both severance pay upon leaving the Walmer Road plant and jobs at the Don Mills plant. It was evident, however, that this was an anomaly relating to a one time mistake made by the intervener, the consequences of which the intervener decided to absorb rather than requiring repayment from employees.

11. It may well have been that the respondent could have communicated more frequently and more clearly with employees throughout this process. However, as a result of the combination of the efforts of the complainants, the respondent and the intervener, I am satisfied that employees in fact were kept informed of events as they unfolded.

12. There is no doubt that serious consequences to employees flowed from the closure of the Walmer Road plant and the endtailing of their seniority. In addition, it is not hard to understand their frustration and their view that they have been wronged. However, it was apparent from the material before me that both the respondent and the intervener were attempting to make the best of a bad situation, and there was no evidence suggesting that the endtailing decision was arbitrary, discriminatory or made in bad faith. As a result, I concluded that the respondent's conduct in this context could not be considered a breach of section 68, and dismissed the complaint.

13. In view of my decision on the merits of this case, I advised counsel that I found it unnecessary to address two preliminary objections with respect to delay and abuse of process made by the respondent and the intervener.

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**0373-87-U General Contractors' Division of the Construction Association of Thunder Bay Inc., Applicant v. Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America and Labourers' International Union of North America, Local 607, and Labourers International Union of North America Ontario Provincial District Council, Respondents v. Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America, Intervener**

**Bargaining Rights - Collective Agreement - Construction Industry - Reconsideration - Collective agreement deemed null and void only insofar as it relates to the ICI sector**

**BEFORE:** R. A. Furness, Vice-Chair, and Board Members C. A. Ballentine and I. M. Stamp.

**DECISION OF THE BOARD;** March 9, 1988

1. On May 7, 1987, the applicant applied to the Board for relief under the provisions of section 135(2a) of the *Labour Relations Act*. In a decision dated July 31, 1987, the Board made the following direction:

16. Having regard to the foregoing and pursuant to the provisions of section 135(2a) of the Act, the Board declares that the collective agreement between the General Contractors' Division of the Construction Association of Thunder Bay Incorporated and the Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America made on December 17, 1986, is unlawful as an agreement or other arrangement other than a provincial agreement contrary to subsection 146(1) of the *Labour Relations Act*, R.S.O. 1980, c.228 as amended and accordingly is null and void and of no force and effect and is not binding upon the General Contractors' Division of the Construction Association of Thunder Bay Incorporated or any of its members.

On July 31, 1987, pursuant to section 135(3) of the *Labour Relations Act*, the Board filed in the



office of the Registrar of the Supreme Court a copy of this direction. Due to a typographical error a corrected version of the direction was filed in the Supreme Court on August 7, 1987.

2. In a letter dated November 9, 1987, counsel for Lumber and Sawmill Workers Union, Local 2693 ("Local 2693") has stated as follows:

It has been brought to our attention that the Board, in its Decision of July 31, 1987, declared that the Collective Agreement between the General Contractors Division of the Construction Association of Thunder Bay Inc. and Local 2693 was null and void.

In the circumstances of the case it appears clear to us that the intention of the Board was to declare that agreement to be null and void insofar as it applied to the I.C.I. Sector of the Construction Industry. As the Collective Agreement is an "all sector" Agreement, it would then remain valid and binding in all other sectors of the Construction Industry.

We would ask that the Board therefore review and clarify its decision in this regard.

3. In a letter dated November 30, 1987, counsel for the Labourers' International Union of North America, Local 607, and Labourers' International Union of North America Ontario Provincial District Council has stated as follows:

Under cover of letter dated November 24, 1987 from the Board Registrar, we are in receipt of a letter dated November 9, 1987 from counsel for Carpenters, Local 2693.

We dispute the crux of the representation of counsel that the Board did not intend to declare the entirety of the collective agreement between the General Contractors Division of the Construction Association of Thunder Bay Inc. and Carpenters, Local 2693 null and void. We dispute the assertions contained in counsel's letter. We note that counsel's letter does not request reconsideration of the issue. Further, we hasten to point out that counsel refrained from any representations relating to the other sectors of the construction industry throughout the entirety of these proceedings and accordingly cannot now bring them forward.

Should counsel formally request a reconsideration of the Board's decision of July 31, 1987, we require notice thereof and a reasonable opportunity to respond thereto at length.

4. In a letter dated January 6, 1988, the Registrar of the Board advised all of the parties as follows:

Further to your letter of November 9th, 1984, wherein you have asked that the Board review and clarify its decision of July 31, 1987, and Mr. Wahl's letter of November 30th, 1987, please be advised as follows:

As you are aware, the Board in its decision dated July 31, 1987, made the following declaration:

16. Having regard to the foregoing and pursuant to the provisions of section 135(2) of the Act, the Board declares that the collective agreement between the General Contractors' Division of the Construction Association of Thunder Bay Incorporated and the Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America made on December 17, 1986, is unlawful as an agreement contrary to subsection 146(1) of the *Labour Relations Act*, R.S.O. 1980, c. 228 as amended and accordingly is null and void and of no force and effect and is not binding upon the General Contractors' Division of the Construction Association of Thunder Bay Incorporated or any of its members.

The Board following a hearing, exercised its jurisdiction pursuant to section 135(2a) of the *Labour Relations Act*, and issued its decision.

The Board does not provide advisory opinions, nor except to the extent that its decisions speak for themselves, does it act to explain or clarify a particular decision.

I note that no request has been made to the Board to reconsider or vary its decision. In the event that your client wishes to make such a request, this request should be made to the Board.

5. In a letter dated January 12, 1988, counsel for Local 2693 requested the Board to reconsider its decision dated July 31, 1987. The Board advised the other parties of this request. None of the other parties has responded to this request.

6. Having regard to the representations before it, the Board, pursuant to section 106(1) of the *Labour Relations Act*, varies its decision in this matter by deleting paragraph 16 thereof and substituting the following therefor:

16. Having regard to the foregoing and pursuant to the provisions of section 135(2a) of the Act, the Board declares that the collective agreement between the General Contractors' Division of the Construction Association of Thunder Bay Incorporated and the Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America made on December 17, 1986, insofar as it purports to apply to the industrial, commercial and institutional sector of the construction industry, is unlawful as an agreement or other arrangement other than a provincial agreement contrary to subsection 146(1) of the *Labour Relations Act*, R.S.O. 1980, c. 228 as amended and accordingly is null and void and of no force and effect and is not binding upon the Construction Association of Thunder Bay Incorporated on any of its members in the industrial, commercial and institutional sector of the construction industry.

7. In all other respects the decision of the Board in this matter dated July 31, 1987, remains unchanged.

8. The Registrar is directed to cause a copy of this direction to be filed exclusive of reasons in the prescribed form at the office of the Registrar of the Supreme Court of Ontario.

## **0974-87-M Ellis-Don Limited, Employer v. United Brotherhood of Carpenters and Joiners of America, Local 1946, Trade Union**

**Bargaining Rights - Conciliation - Construction Industry - Reference - Whether union holds bargaining rights in the non-ICI sectors of the construction industry for the employees of the employer - Board finding that bargaining rights existing - No abandonment of bargaining rights - Minister having authority to appoint a conciliation officer**

**BEFORE:** *Owen V. Gray*, Vice-Chair, and Board Members *J. A. Rundle* and *C. A. Ballentine*.

**APPEARANCES:** *Bruce Binning* and *Leonard Finegold* for the employer; *Douglas J. Wray*, *Frank Manoni* and *Magnus Graham* for the trade union.

**DECISION OF THE BOARD;** March 30, 1988

1. This is a reference from the Minister under section 107 of the *Labour Relations Act* ("the Act") in which he asks "whether or not the trade union holds bargaining rights for the employer for carpentry in all sectors other than the ICI sector in Board Area 3, and following therefrom, whether or not the trade union's request for conciliation is proper."

2. On May 11, 1987, the Minister received a request from the trade union for the appoint-

ment of a conciliation officer. The request described the nature of the employer's business affected by the application as: "all construction work related to carpentry in all sectors, other than the industrial, commercial and institutional sector, of the construction industry." It stated that notice had been given to bargain for the renewal of a collective agreement dated September 8, 1982 by which the trade union claimed it and the employer had been bound. A conciliation officer was appointed on May 19, 1987. On May 25, 1987, the Minister received a letter from the employer in which it objected to the appointment and asserted that it had no contractual agreement with the union "in the residential sector" and that "this union has no bargaining rights." After inviting and receiving the union's comments on the employer's objection, the Deputy Minister, acting in the name of the Minister, revoked the appointment of the conciliation officer and, on July 8, 1987, referred the matter to the Board under section 107. We heard the parties' evidence and argument with respect to this reference on September 29, 1987 and January 18, 1988 and received certain further written submissions in mid February, 1988, as a result of which a hearing scheduled for February 15, 1988 was cancelled.

3. It is common ground that the trade union and the employer were bound by a collective agreement dated July 26, 1965 between the General Contractors' Section of the London Builders' Exchange (which was referred to in that agreement as "the Employer") and the Western Ontario District Council of the United Brotherhood of Carpenters and Joiners of America (which was referred to in that agreement as "the Union"). Article 5 of that agreement (hereafter referred to as "the 1965 agreement") provided that:

ARTICLE 5 - RECOGNITION:

The Employer, for itself and its members, recognizes the Union as sole Bargaining Agent for all Employees performing work coming within the acknowledged jurisdiction of the Union and similarly the Union recognizes the Employer as sole Bargaining Agent for members of the Employers organization, ...

It is acknowledged that the General Contractors' Section of the London Builders' Exchange was then an employer organization within the meaning of the Act and that Ellis-Don Limited was a member of that organization for whom it had authority to enter into this agreement. It appears from the 1965 agreement that the Western Ontario District Council ("the Council") consisted of three locals of the United Brotherhood of Carpenters and Joiners of America: Locals 1946, 2222 and 2451. Article 2 of the Appendix to that agreement provided that "the area covered by this Agreement is the six counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin" which collectively constitute Board Area 3. Article 8(a) of the Appendix describes the Counties of Huron, Perth and Bruce as "the area of jurisdiction covered by Locals Nos. 2222 and 2451", from which we conclude that the Counties of Oxford, Middlesex and Elgin comprised the area of jurisdiction of Local 1946 under that agreement.

4. The 1965 agreement was in effect from July 26, 1965 to April 30, 1968. During the period May 1, 1968 to April 30, 1971, the employer and trade union were bound by the Carpenters' Appendix to a multi-trade agreement between the London & District Construction Association and the London Building and Construction Trades Council. The terms of that agreement were extended to April 29, 1972, with certain amendments, by an agreement dated August 12, 1971 between the General Contractor and Carpentry Section of the London & District Construction Association ("the Association") and the Western Ontario District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO-CLC, Locals 1946, 2222 and 2451 ("the Council"). The Association and the Council then entered into a collective agreement covering the period May 1, 1972 to April 30, 1973. That agreement was extended, with certain amendments, to April 30, 1975. The Association and the Council then entered into a further collective agreement



covering the period May 1, 1975 to April 30, 1977. That agreement was extended to April 30, 1978 by a Memorandum of Agreement dated April 29, 1977. It is common ground that the trade union and the employer were bound by all of these agreements. While the language of those agreements differs from that of the 1965 agreement, it is not suggested that the trade union's bargaining rights under the 1965 agreement were modified or qualified by any provision of any of the agreements between 1968 and 1978.

5. On October 27, 1977, the *Labour Relations Act* was amended to provide for province-wide bargaining in the industrial, commercial and institutional ("ICI") sector of the construction industry, in accordance with provisions which (with certain subsequent amendments) now appear in sections 137 to 151 of the present Act. On March 3, 1978, pursuant to what was then clause 127(1)(b) of the Act (now clause 139(1)(b)), the Minister of Labour designated an employer bargaining agency ("the Carpenters Employer Bargaining Agency") consisting of the Acoustical Association of Ontario, Caulking Contractors Association of Ontario, Labour Relations Bureau of Ontario General Contractors Association and Resilient Flooring Contractors Association of Canada, to represent in bargaining all employers whose employees are represented by various "carpenters" affiliated bargaining agents, including the Western Ontario District Council and Local 1946. By virtue of what was then section 131 (now section 143) of the Act, all rights, duties and obligations under the Act of employers for which it was to bargain vested in that employer bargaining agency, "but only for the purpose of conducting bargaining and concluding a provincial agreement." "Provincial agreement" was defined in clause 125(e) (now clause 137(1)(e)) as an agreement respecting the terms or conditions of employment, etc., of "employees represented by the affiliated bargaining agents *and employed in the industrial, commercial and institutional sector of the construction industry referred to in clause (e) of section 106* [now clause 117(e)]" (our emphasis), as well as their employers and the affiliated bargaining agents themselves. Also on March 3, 1978, pursuant to clause 127(1)(a) (now clause 139(1)(a)) of the Act, the Minister of Labour designated the United Brotherhood of Carpenters and Joiners of America and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America as the employee bargaining agency ("the Carpenters Employee Bargaining Agency") to represent in bargaining certain affiliated bargaining agents, including the aforesaid Council and Local 1946. Under section 130 (now section 142) of the Act this designation vested in the employee bargaining agency all rights, duties and obligations under the Act of the affiliated bargaining agents for which it was to bargain, "but only for the purpose of conducting bargaining and ... concluding a provincial agreement."

6. The new province-wide ICI sector bargaining provisions of the *Labour Relations Act* came into effect on April 30, 1978. Some time thereafter, the Carpenters Employer Bargaining Agency and the Carpenters Employee Bargaining Agency concluded a collective agreement in which the former is described as "the EBA" and the latter is described as "the Union." Articles 3.01, 3.02 and 3.03 of that agreement provided as follows:

#### ARTICLE 3 - RECOGNITION

3.01 The EBA recognizes the Union as the sole and exclusive bargaining agent for all journeymen and apprentices, other than millwrights, engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario for whom the Union has bargaining rights.

3.02 The Union recognizes the EBA as the sole and exclusive bargaining agent for all employers whose employees are represented by the Union and for whom the Union has bargaining rights who are engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

3.03 Except in the geographic area of Local Union 1669, Thunder Bay, this Agreement shall

also apply to the sectors covered under the collective agreements which were in force in the industrial, commercial and institutional sector immediately prior to the effective date and application of this Agreement provided that the employer may become a signatory to the provincial Heavy Construction Agreement entered into by the United Brotherhood of Carpenters and Joiners of America and the Heavy Construction Association of Ontario, to a Local Union or District Council residential agreement, or to any maintenance agreement that may be negotiated between the parties to this Agreement.

That agreement ("the first provincial agreement") was in effect from May 1, 1978 to April 30, 1980. The language of Article 3.03 of the first provincial agreement did not appear in the next (or any subsequent) provincial agreement concluded between the Carpenters Employer Bargaining Agency and the Carpenters Employee Bargaining Agency.

7. On May 19, 1970, certain persons signed a "Residential Agreement" styled as being between the London and District Construction Association and the London Building and Construction Trades Council, concerning employment of tradesmen in construction of residential buildings. This agreement was to come into effect only if all relevant unions agreed to it. The Western Ontario District Council did with respect to carpenters, but the unions representing some other trades did not. Accordingly, this 1970 residential agreement never came into effect as between the employer and the union.

8. In 1979, the union party to these proceedings, Local 1946, entered into a collective agreement styled as being with "the General Contractor and Carpentry Section of the London & District Construction *for whom proxies are held*" (emphasis added), covering "all construction carpenters, apprentices and working foremen for whom the union has bargaining rights engaged in on-site construction in the residential sector in the Counties of Oxford, Middlesex and Elgin." The term of that agreement was from May 1, 1979 to April 30, 1980. It was subsequently extended to April 30, 1982, and again to April 30, 1984, with changes in the wage rates. It is this agreement, with its extensions, on which the union initially relied in its request for appointment of conciliation officer. The employer, however, takes the position that the words "for whom proxies are held" appended to the name of the employer party in the style of that agreement were intended to mean that an employer would only be covered by that agreement if it had given a proxy to the General Contractor and Carpentry Contractor Section of the London & District Construction Association signifying its willingness to be bound by that agreement. The union does not dispute that interpretation, nor does it dispute the employer's assertion that it never provided the required proxy. It concedes that the employer was not bound by the 1979 residential agreement or any of its successors.

9. John W. Tiefenback is the General Manager and Director of Industrial Relations for the London & District Construction Association. He has held that position since 1966. He says that the 1965 agreement and the subsequent agreements referred to in paragraph 4 of this decision only covered what is now known as the industrial, commercial and institutional sector of the construction industry. He bases that view on the fact that the contractors who dealt with the Council through the Association only performed ICI work during the period in question, and on his belief that that was the work about which the Association was negotiating with the Council when they entered into those agreements. He acknowledges that the Association had authority to bargain on behalf of the employer in making those agreements, and that that authority was not expressly limited to any particular sector of the construction industry. He says he did not understand that any of the Carpenters' unions had bargaining rights in the residential sector for any of the members of the Association when the Association negotiated the 1971 Residential Agreement referred to in paragraph 8 above, nor when the Association negotiated the series of residential agreements referred to in paragraph 9. Apart from their involvement in negotiating those agreements, he does not



ascribe to the Council or to Local 1946 any behaviour on which he claims to base his belief that neither Local 1946 nor the other members of the Council held bargaining rights with respect to employees of Association members working in the residential sector or, indeed, in any sector outside the industrial, commercial and institutional sector.

10. The theory of the employer's case is that:

1. The union never had bargaining rights for employees of the employer outside the ICI sector.
2. If the union did have bargaining rights for employees of the employer outside the ICI sector, those rights were abandoned when, or after, it was agreed that Article 3.03 of the first provincial agreement would be omitted from the subsequent provincial agreement.
3. If the union did and still does have bargaining rights with respect to employees of the employer outside the ICI sector, the last agreement which addressed those rights would have been the first provincial agreement and, as a conciliation officer was appointed in 1980 with respect to the negotiation of the renewal of that agreement, the Minister has no power to make a further appointment in that regard.

11. The trade union's bargaining rights under the 1965 agreement were not expressly limited to any particular sector of the construction industry. On their face, they unambiguously cover the employment of carpenters and carpenters' apprentices engaged in work within the work jurisdiction of the union in the geographic area to which the agreement applied. The negotiation by the Council and Local 1946 of the "Residential Agreements" referred to in paragraphs 7 and 8 above is not inconsistent with the proposition that the language of the 1965 agreement meant what it appears to say. Subject to sections 15 and 68 and subsection 52(3) of the *Labour Relations Act*, a union and employer can consolidate or divide bargaining units of employees of the employer for whom the trade union is the exclusive bargaining agent. A construction trade union which holds bargaining rights for persons employed by an employer in all sectors can seek to negotiate a separate collective agreement covering employees of that employer in a particular sector of the construction industry without its being suggested that the union has thereby acknowledged it has no existing bargaining rights in that sector. Thus, the evidence with respect to the residential agreements does not reveal a latent ambiguity in the language of the 1965 collective agreement, nor does any of the other evidence of Mr. Tiefenback. We conclude that the trade union members of the Council had bargaining rights for any and all carpenters or carpenters' apprentices whom the employer might employ from time to time in Board Area 3, not just those employed in the ICI sector of the construction industry or on projects similar to those in which the employer was ordinarily engaged in 1965. Having regard to the language of the 1965 agreement and to what is now subsection 51(4) of the *Labour Relations Act*, we conclude that in 1965 Local 1946 had bargaining rights for all carpenters and carpenters' apprentices employed by the employer in the Counties of Oxford, Middlesex and Elgin. That disposes of the first of the three propositions on which the employer relies.

12. The employer's other propositions depend, in part, on the assertion that the union's bargaining rights with respect to carpenters and carpenters' apprentices employed by the employer outside the ICI sector of the construction industry were dealt with during negotiations for the first and second provincial agreements. Those were negotiations between an employer bargaining agency and an employee bargaining agency. The only *statutory* bargaining authority those agencies had was with respect to employment in the ICI sector. Any authority to bargain with respect to



rights outside the ICI sector would have to have come from something other than the Minister's designation - some action by the affected employers and trade unions conferring actual or ostensible authority to bargain outside the statutory mandate. There is no evidence before us that the employer, or anyone authorized to do so on its behalf, ever took any action which would have conferred on the Carpenters Employer Bargaining Agency actual or ostensible authority to deal with any matter other than the provincial agreement contemplated by the province-wide bargaining provisions of the *Labour Relations Act*. We note that counsel for the employer sought and was granted an adjournment so that he could introduce such evidence, but did not do so when our hearing resumed.

13. Although he initially said he would, counsel for the employer did not argue that the omission from the second provincial agreement of the language of article 3.03 of the first provincial agreement itself amounted to or reflected an abandonment of the union's non-ICI bargaining rights for employees of the employer. He argued, however, that that event together with the failure thereafter to "take steps to protect those bargaining rights" amounted to an abandonment of those bargaining rights. As we understand the material put before us, the omission in the 1980-82 provincial agreement of language similar to article 3.03 of the first provincial agreement followed from the two parties' having acknowledged, at least in the end, that the employer bargaining agency was not then authorized to deal with matters beyond the scope of its statutory authority. Counsel for the employer concedes that the deletion of Article 3.03 did not reflect an intention on this union's part to abandon the bargaining rights in issue here. While the union did not press the employer to negotiate a collective agreement with respect to non-ICI work for some years thereafter, it is common ground that the employer did not engage in any such work in the area covered by the union's bargaining rights until the fall of 1986. It is apparent that the union acted promptly once that occurred.

14. The question whether a trade union has abandoned bargaining rights with respect to a unit of employees is a question of fact. The date of expiry of the last collective agreement to cover that unit is one consideration in addressing that question. The union did give notice to bargain on February 8, 1978 under the then collective agreement between the Association and the Council. That notice was not limited to the ICI sector. Both parties agree that notice brought the then subsisting agreement to an end at the conclusion of its term with respect to all sectors. It does not matter to our determination of the question of abandonment whether the last agreement to cover carpenters employed by the employer outside the ICI sector was the agreement which expired in 1978 or, as counsel for the employer argues, the first provincial agreement which expired in 1980. Whenever the period began during which the union thereafter allegedly failed to "take steps to protect" its non-ICI bargaining rights, there was no employment to bargain about until the fall of 1986. Accordingly, the fact that the union did not seek to bargain before then does not logically support an inference that it had abandoned the right to do so. (See *Inducon Construction (Northern) Inc.*, [1982] OLRB Rep. March 390 and *Barkmar Builders Ltd.*, [1984] OLRB Rep. Apr. 565.) We do not find that the union abandoned the bargaining rights in question here.

15. Finally, there is the question whether either the 1978 or the 1980 appointment of a conciliation officer precludes the Minister's now making another appointment otherwise than under sub-section 16(4) of the Act, which requires a joint request of the parties. A prior appointment could only stand in the way if it had been made with respect to an ultimately unsuccessful attempt by or on behalf of *this* employer and *this* union to make a collective agreement with respect to employees of the employer working otherwise than in the ICI sector of the construction industry.

16. The only information we have about the appointment of a conciliation officer in 1978 is a copy of the Request For Appointment of Conciliation Officer which was made by the Carpenters

Employer Bargaining Agency on or about May 15, 1978. That Request named "Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America, United Brotherhood of Carpenters and Joiners of America" as the Trade Union party to the dispute in respect of which the appointment was requested. Paragraph 1(c) of the request described the "specific nature of employer's business affected by this application" as "industrial, commercial and institutional construction." All of the paragraphs of the standard form which address the origin of bargaining rights and particulars of the last expired collective agreement are crossed out. Express reference is made in paragraph 6 of the Request to the designation orders of March 3, 1978. Sub-paragraph 4(1) of the Request indicates that the (only) pertinent notice to bargain was dated February 1, 1978. We do not have before us copies of any of the correspondence in which the Minister or his delegate would have engaged following receipt of this Request.

17. With respect to negotiations for the 1980-82 provincial agreement, it was again the Carpenters Employer Bargaining Agency which, on March 28, 1980, filed a Request for Appointment of Conciliation Officer. From the way the Request was filled in, it appears to be limited to the ICI sector bargaining for which the Carpenters Employer Bargaining Agency had statutory authority as a result of the Minister's designations. For example, the request is not accompanied by the list of employers or any of the other information contemplated by Note 2 to the form on which the Request is made. That Note provides:

- (2) If a council of trade unions or an employers' organization is involved, the names and addresses of the unions and of their official representatives and a copy of the list of employers as submitted by the employers' organization at the start of negotiations, giving names and addresses of the individual employers, must be given and the list must be appended to this form.

The Carpenters Employer Bargaining Agency made reference to this omission in paragraph 6 of the Request:

In regard to NOTES AND COMMENTS, paragraph (2), it is our submission that this does not apply to the Provincial Designation provisions and where all correspondence between the parties is limited to the addresses given in 1(a) and 1(f).

This certainly leaves the impression that the bargaining in question is only the bargaining which results from the "Provincial Designation provisions", which would be bargaining with respect only to the ICI sector. This seems to have been the understanding of those who dealt with the Request on the Minister's behalf. The caption on the Deputy Minister's letter of March 31, 1980 acknowledging receipt of that Request set out the names of the constituent elements of the employer and employee bargaining agencies and included the following words in parentheses: "journeymen and apprentices, other than millwrights, *engaged in the industrial, commercial and institutional sector of the construction industry* in the Province of Ontario" (our emphasis). A similar notation appeared in the caption to the Deputy Minister's letter to the Carpenters Employer Bargaining Agency of May 9, 1980, informing it that the Minister had decided not to appoint a Board of Conciliation "in reference to the dispute between the above-mentioned employer and trade union."

18. On the evidence before us, we are unable to conclude that either the appointment of conciliation officer in 1978 or the appointment in 1980 was with reference to any bargaining other than the ICI sector bargaining in which the employer and employee bargaining agencies had *statutory* authority to engage. With respect to the 1978 appointment, there is no evidence either of a request with respect to other than ICI bargaining or that the Minister had notice, before making any appointment, that the bargaining agencies had any bargaining authority other than that conferred on them by statute as a result of the Minister's designation orders. As for the 1980 appointment, it is clear from the correspondence which issued from the Deputy Minister (as delegate of

the Minister) that the bargaining with respect to which the appointment was made was ICI bargaining. Whether the last agreement covering non-ICI work expired in 1978 or 1980, there has been no subsequent appointment of a conciliation officer with respect to non-ICI bargaining. The employer's third argument therefore fails.

19. In the result, we find that the trade union is the exclusive bargaining agent for carpenters and carpenters' apprentices employed by the employer in sectors other than the ICI sector in the Counties of Oxford, Middlesex and Elgin. We also find that the Minister has the authority to appoint a conciliation officer to confer with the trade union and employer and endeavour to effect a collective agreement covering such employees.

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**2937-87-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. Fram Canada Inc., Respondent, v. Group of Employees, Objectors**

**Certification - Petition - Practice and Procedure - Applicant filing with Board on day before hearing particulars regarding the voluntariness of a petition - Particulars referring to a series of events occurring as long as six months earlier - Applicant also requesting certification pursuant to s.8 - Applicant's obligation to file particulars of allegations of misconduct which are intended to apply solely to the issue of the voluntariness of a petition only arises when it is advised by the Board that a petition has been filed - Particulars of s.8 claim should have been filed with application but adjournment of case required for other reasons - Board refusing to strike that claim out merely because it could have been asserted earlier**

**BEFORE:** *Owen V. Gray*, Vice-Chair, and Board Members *G. O. Shamanski* and *H. Peacock*.

**APPEARANCES:** *L. A. MacLean*, *Hemi Mitic*, *Glen Myers* and *Wayne McKay* for the applicant; *Joe Carrier*, *Tom Patterson* and *Ed Bocik* for the respondent; *Michael Mitchell* for the objectors.

**DECISION OF THE BOARD;** March 23, 1988

1. This decision deals with the objectors' submission that certain charges made by the applicant were not filed in a timely fashion and should not be entertained in these proceedings.

2. This application for certification was filed on January 28, 1988. The Registrar set February 16, 1988 as the terminal date for the application and scheduled it for hearing March 4, 1988. 226 written statements of objection to certification of the applicant ("petitions") were filed with the Board on the terminal date. The Board's letter to the applicant advising it of this filing is dated February 24, 1988 and appears to have been sent by ordinary mail. The applicant says it received that letter on March 1, 1988; this assertion is not challenged.

3. In mid-afternoon on March 3, 1988, the applicant delivered to the Board a 9-page document entitled "Particulars Regarding the Voluntariness of the Purported Statement of Desire, Rule 72." The series of events referred to in it are alleged to have occurred as long ago as August 26, 1987 and as recently as February 14, 1988, and are described therein as representing interference by the respondent with its employees' selection of a bargaining agent, contrary to section 64 of the *Labour Relations Act* ("the Act"). The applicant pleads in this document that the petitions,



having been gathered in the circumstances alleged, do not represent voluntary expressions of the wishes of the persons who signed them. Further, the applicant makes the submission that the true wishes of the affected employees could not now be ascertained by way of a representation vote, and asks that it be certified without a vote pursuant to section 8 of the Act.

4. The objectors and respondent first saw the document in question on the morning of March 4, 1988, when they attended for the scheduled hearing of this application. Representatives of the applicant, respondent and objectors spent most of the day meeting with one another and one of the Board's Labour Relations Officers to discuss the composition of the appropriate bargaining unit and reviewing the list of employees filed by the employer, which the applicant and objectors saw for the first time that day. As a result, the hearing before us began at 3:45 in the afternoon. At that point it was clear that, in any event of the outcome of the participants' remaining disputes over the composition of the appropriate bargaining unit and the list of persons employed in that unit on the application date, the documentary evidence of membership filed by the applicant is sufficient, if found satisfactory, to permit certification of the applicant without a vote under section 7 of the Act. Having regard to the number of petitions apparently signed by employees for whom membership evidence has been filed, it was also clear that if the petitions are found to be voluntary expressions of the wishes of those who signed them, the Board would ordinarily exercise its discretion under subsection 7(2) of the *Labour Relations Act* to order a representation vote even if the revocations filed by the applicant all represent the last voluntary expression of wishes of those who signed them.

5. Counsel for the objectors argued that the applicant's filing of charges the day before the hearing violated section 72 of the Board's Rules of Procedure, which requires the prompt filing before hearing of particulars of any allegations of improper or irregular conduct on which a party intends to rely at hearing. Although he did not question the applicant's assertion that it did not receive the Board's advice of the filing of the petitions until March 1, 1988, he argued that the union could have contacted the Board by telephone shortly after the terminal date to ascertain whether petitions had been filed. He also argued that the union must have known of the circulation of the petition prior to March 1, 1988, having regard to certain as yet unproven material he had filed in connection with the objectors' charges of wrongdoing by the applicant.

6. Counsel for the respondent supported the objectors' request, citing the Board's decisions in *Burlington Hotel Company Limited*, [1969] OLRB Rep. Nov. 970 and *Gignac, Sutts, Nosanchuk*, [1973] OLRB Rep. Aug. 438. He conceded, however, that good labour relations considerations favour the Board's not requiring that an applicant file particulars of alleged management misconduct relied upon only with respect to the voluntariness of employee petitions until after the applicant is notified that such petitions have been filed. He agreed that the applicant here acted promptly after being so advised. As for the claim under section 8, however, he argued that the time for filing allegations then known to the applicant was the application date and that the applicant had not been prompt in that regard.

7. If the decision in *Burlington Hotel Company Limited*, *supra*, stands for the proposition that allegations of misconduct with respect to a petition must be filed, if then known, before the applicant knows whether any petition has been filed, it would appear to contradict other Board decisions of comparable vintage: *Canadian Hanson & Van Winkle Company Limited*, [1967] OLRB Rep. Nov. 756; *National Starch & Chemical Co. (Canada) Ltd.*, [1968] OLRB Rep. Sept. 597; *Pre-Con Murray Limited*, [1968] OLRB Rep. Nov. 793; *Navco Food Services Ltd.*, [1969] OLRB Rep. Nov. 979; *Journal Printing Company*, [1971] OLRB Rep. Jan. 18; and, particularly, *Tradewoods Manor Nursing Home Ltd.*, [1971] OLRB Rep. Mar. 136. We are of the view that an applicant's obligation to file particulars of allegations of misconduct which are intended to apply

solely to the issue of the voluntariness of a petition or petitions arises when it is advised by the Board that a petition has been filed and that that is so even if the applicant has prior knowledge that a petition was being circulated. We need not decide whether such prior knowledge triggers an earlier duty to investigate which would affect the promptness with which an applicant would be expected to file petition-related charges once it is notified by the Board of the filing of a petition. By any measure, this applicant acted promptly once it was notified. We do not agree that applicants are under any obligation to seek advance notice of information which would in due course be the subject of official communication by the Registrar in writing, nor do we accept the implication that the Registrar should be expected to answer telephone enquiries about filings before she has given official notice of the filings to all affected parties in the usual manner.

8. Given the quantity of membership evidence filed, the claim under section 8 appears to add nothing, by way of response to the petitions, to the mere assertion of the facts on which it is based. If all of the applicant's membership evidence is satisfactory, then the Board has the power in this case to certify without a vote without resort to section 8. It is most difficult to imagine the Board's exercising its discretion under subsection 7(2) by ordering a vote in circumstances to which section 8 would apply. If the documentary evidence filed by the applicant is not satisfactory evidence of *membership*, that will be as a result of something other than the petitions (see *Unlimited Textures Company Limited*, [1984] OLRB Rep. Jan. 138 at paragraphs 15, 16 and 17). The claim under section 8 would then be an alternate basis for the applicant's claim for certification, not just a matter of reply on an issue first raised by the objectors. To the extent it relies on allegations of which the applicant then had knowledge, it might fairly be said that the promptness envisaged by section 72 of the Board's Rules of Procedure favoured the applicant's asserting and particularizing its claim under section 8 at the time it filed this application.

9. If on March 4, 1988 there had been any prospect that, but for the allegations relied upon in the claim under section 8, this application would be disposed of that day, then the argument that that claim should be rejected as untimely would be worthy of serious consideration. There was no such prospect, however. Even if there had been no allegations of misconduct, the hearing of the participant's dispute about the composition of the bargaining unit and the usual inquiry into the circumstances of origination, circulation and signing of 226 petition documents would not have been completed on March 4th, even if the whole day had been available for that purpose. We would not have commenced such a hearing at 3:45 in the afternoon in any event. The number of employees in the bargaining unit sought in this case, together with the current practice of delaying the union's scrutiny of the employer's list until the first scheduled date of hearing, effectively ensured that the first scheduled hearing day would not be the first day of hearing with respect to any matter of substantial dispute. Even when it has found that allegations in support of a claim under section 8 could have been made earlier, the Board has not refused to entertain the claim when the timing of its filing did not itself lead to an adjournment or otherwise cause prejudice or delay: *Riverdale Frozen Foods Limited*, [1979] OLRB Rep. Apr. 338. Here, an adjournment to a series of future dates was necessary due to factors unrelated to the introduction of the applicant's claim under section 8. In those circumstances, we see no good reason to strike the claim out merely because it and a portion of the allegations on which it is based could have been asserted earlier.

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**0315-87-U John Glykis, Complainant v. Hotel Employees, Restaurant Employees Union, Local 75, Respondent v. Four Seasons Hotels Limited (Inn On The Park), Intervener**

**Duty of Fair Representation - Unfair Labour Practice - Allegation that union counsel's failure to call a certain witness at an arbitration hearing contravened the fair representation duty - Counsel's decision not to call witness was a judgment call based on experience and the circumstances of the case - Evidence would not have affected the result of the arbitration - No breach of duty**

**BEFORE:** *Ken Petryshen*, Vice-Chair.

**APPEARANCES:** *John Glykis, Arnold Bruner and Dominic DiCarlo* for the complainant; *Alick Ryder* for the respondent; *Paul Young and Dolores Zimak* for the intervener.

**DECISION OF THE BOARD;** March 8, 1988

1. This is a complaint under section 89 of the *Labour Relations Act* in which it is alleged that Hotel Employees, Restaurant Employees Union, Local 75 ("Local 75" and "the union") contravened section 68 of the Act.

2. This matter came on for hearing on February 9, 1988. When counsel for the complainant began his opening remarks by referring to the complaint's historical context, the Vice-Chair advised the parties that he had read the Complaint as well as the previous decisions of the Board and an arbitration award involving Mr. Glykis, all of which were referred to in the Complaint. Counsel for the complainant called two witnesses and counsel for the respondent union called one witness to testify. The evidence and the parties' submissions were completed shortly after the noon hour on February 9. The Vice-Chair advised the parties at that point that he would take some time to review the material, the evidence and the submissions in order to determine whether he was able to provide the parties with an oral decision that day. The matter was adjourned to 1:30 p.m. When the hearing resumed at that time, the Vice-Chair indicated that he was in a position to provide the parties with an oral decision and that the written reasons for the decision would follow in due course. The Vice-Chair then orally ruled at the hearing that after considering the evidence and the parties' submissions, the complaint would be dismissed since the Vice-Chair was satisfied that the respondent did not breach section 68 of the Act. The Vice-Chair's reasons for so doing are as follows.

3. The essence of the complainant's section 68 allegation can be stated briefly. An arbitration hearing was held on June 4 and November 19, 1985 in order to entertain the complainant's discharge grievance. The respondent union was represented by counsel at the arbitration proceeding, namely C. Paliare. An employee of The Four Seasons Hotels Limited (Inn On The Park) (the "employer" and the "hotel") by the name of DiCarlo was not called to give evidence at the arbitration proceeding. The complainant alleges that by failing to call DiCarlo as a witness, particularly when the complainant insisted he be called, the union contravened section 68 of the Act. The sole arbitrator, E. E. Palmer, Q.C., issued his award dismissing the complainant's discharge grievance on March 12, 1986.

4. In order to appreciate the circumstances giving rise to this complaint, it is necessary to review the events relating to the complainant's discharge and the Board's decisions and the arbitration award which followed.

5. Glykis was employed by the hotel as a doorman between 1979 and October 19, 1983,



the date of his termination. The hotel terminated Glykis for an incident which occurred during the evening of October 14, 1983 between Glykis and a hotel guest. It was Glykis' conduct towards the guest that caused the hotel to terminate his employment. Glykis grieved his discharge. As a result of an Executive Board meeting on November 3, 1983 and a membership meeting on November 8, 1983, the union determined it would not proceed to arbitration with Glykis' grievance. This caused Glykis to file a section 89 complaint with the Board alleging a breach of section 68 of the Act. The Board (Vice-Chair Murray) allowed this complaint and its reasons for so doing are set out in *Four Seasons Hotels Limited*, [1984] OLRB Rep. Oct. 1406 (the "Murray decision"). Since Glykis was not satisfied with the relief he obtained in the Murray decision, he applied for reconsideration. The Board (Vice-Chair Murray) dismissed the reconsideration request and its reasons for so doing are contained in *Four Seasons Hotels Limited*, [1985] OLRB Rep. March 420 (the "Murray reconsideration"). When the Local 75 membership ultimately voted to take the complainant's grievance to arbitration, the complainant wished to be represented by his own counsel at the arbitration hearing with the costs to be borne by the union. When the union refused his request, Glykis filed a second section 89 complaint with the Board, alleging a contravention of section 68 of the Act. The Board (Vice-Chair Tacon) dismissed the second section 89 complaint and its reasons for so doing are set out in *John Glykis*, [1985] OLRB Rep. Aug. 1212 (the "Tacon decision").

6. The following paragraphs in the Tacon decision contain a summary of the background to that complaint which refers extensively to the Murray decision and the Murray reconsideration:

2. It is useful to set out the background to the present complaint. The complainant first filed a complaint alleging contravention of section 68 of the Act as a result of a decision by the union's executive board and membership not to proceed to arbitration with a grievance against the complainant's discharge from the Inn On The Park. By decision of the Board (Vice-Chairman Murray) dated October 31, 1984, [reported at [1984] OLRB Rep. Oct. 1406], the complaint was upheld on the narrow ground that the complainant, because of inadequate notice, was, in effect, not given an opportunity to present his case to the executive board and membership meetings of the respondent. It is appropriate to set out the following passages from that decision.

16. The recollections of all the material witnesses, Mr. Glykis and Messrs. Pineo, Longe and Marshall, are cloudy on many important aspects and details of conversations, investigations and actions. It appears from the evidence of the union that Mr. Glykis may not have been wrong in his assertions made many times to Mr. Longe that everyone at the hotel did not like him. Unfortunately for Mr. Glykis, there were concrete, indisputable instances where he was rude and abusive with staff and management, and this was the very conduct he was accused of in connection with the guest on October 14, 1983. This type of grievance required the Business Manager, the Business Representative and the membership to take into account the grievor's character and patterns of conduct to assess the likelihood of succeeding at arbitration. Be that as it may, it is still clear and undisputed that Mr. Glykis, in accordance with the Local's normal practice, was entitled to be present at the Executive and membership meetings to plead his case. Perhaps if he had attended, he could have explained his conduct or dispelled these assessments about his penchant for getting into altercations. He clearly missed an opportunity which he should have had and could have had according to international union procedures if he had been given clear times and places of these meetings. If the timing of the meetings had been different, then it would be understandable that Mr. Longe would not advise on them specifically. However, common courtesy would have dictated that Mr. Glykis be advised of the rapidly approaching consideration of his grievance. This conduct amounted to gross negligence and I have found on this basis that this is arbitrary treatment and a violation of section 68.

17. The remedy in this instance is the extension of an opportunity to Mr. Glykis to attend before both the Executive and membership meetings and present his case, with or without the assistance of his counsel. Should the membership decide to support his

arbitration, we order that the time limits of the collective agreement not be used as a defence by the hotel.

[emphasis added]

3. The complainant was not content with this relief. Before Vice-Chairman Murray, the complainant had sought: an award of costs; that the Board hear and determine the merits of the discharge grievance; that, alternatively, the Board should refer the matter directly to arbitration with a direction that the complainant be represented at that hearing by his own counsel, with costs borne by the union. On receipt of the Board's decision, the complainant sought reconsideration, again seeking the relief just outlined. Vice-Chairman Murray, in a decision dated March 22, 1985, [reported at [1985] OLRB Rep. March 420] dismissed the reconsideration request. It is again useful to refer the portions of that decision.

7. ... I did not grant the complainant's request that he be compensated for the "costs" incurred in his pursuit of the unfair labour practice complaint because it is the Board's general practice, in exercising its remedial powers under section 89, not to grant costs to the successful party. The Board has, in other cases prior to the complainant's, thoroughly canvassed the policy issues involved in this remedial area and has determined that there must be extraordinary circumstances or other overriding policy considerations before costs will be awarded to the successful party in a section 89 complaint (see *Radio Shack*, [1979] OLRB Rep. Dec. 1220; *Comstock Funeral Home*, [1981] OLRB Rep. Dec. 1755 for a fuller statement of the Board's rulings). Neither of these conditions was present in the complainant's case and it was no different, for the purposes of an award of costs, from the numerous cases in which the Board finds a violation of the Act. It was for this reason that I rejected the request for an award of "costs". Nothing in the letter requesting reconsideration causes me to change this aspect of the decision of October 31, 1984.

8. In requesting that the Board arbitrate the complainant's discharge grievance itself or refer the grievance to arbitration directly, rather than resubmit the grievance for reconsideration by the union executive and membership, counsel is again merely repeating the submissions made at the hearing. The Board has stated on numerous occasions that success in proving that section 68 has been breached does not automatically confer on the complainant the right to have his grievance arbitrated (see, for example, *Massey-Ferguson*, [1977] OLRB Rep. April 216; *Bedard Girard*, [1981] OLRB Rep. Oct. 1338). Where the Board does grant such a remedy, the Board, in normal circumstances, does not assume the task of arbitrating the grievance itself because of the longstanding policy of deferring to the arbitration process of the collective agreement where such process will yield a complete remedy (see *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254). In this case the loss to the complainant resulting from the contravention of section 68 of the Act was the deprivation of the opportunity to be present at the executive and membership meetings and present his case. As the Board noted at paragraph 16, the complainant "clearly missed an opportunity which he should have had and could have had according to internal union procedures if he had been given clear times and places of these meetings". Therefore, on this basis alone, I do not consider it necessary to change my decision regarding the request for arbitration. In any event, this aspect of the complainant's reconsideration request has been overtaken by events. A copy of a letter dated January 10, 1985, written by counsel for the complainant to the union and forwarded to the Board, indicates that the complainant was provided an opportunity to present his case to the union membership, and that the membership voted to overrule the executive board's decision. As a result, the complainant's grievance was to be referred to arbitration immediately. Even if it could be said that I was wrong in not ordering arbitration, the action of the membership of the union has removed any necessity for the Board to reconsider the adequacy of its remedy of returning the grievance to the normal union procedures as compared with the requested remedy of arbitration.

9. The complainant also requested at the hearing that, if the matter proceeds to arbitration, he should have the opportunity to retain his own counsel to present the arbitration on his behalf. This request has also been repeated in the application for reconsideration. The Board did not see then, and does not see now, any justification for

such a claim. *Nothing in the evidence suggests any malice or ill will towards the complainant by officials of the union. The wrongdoing attributed to the union stemmed from "gross negligence". On the contrary, as indicated in paragraph 3 of the Board's decision, the complainant has received the union's assistance without complaint on many previous occasions. The assistance rendered by the respondent following the complainant's termination in October of 1983, though falling below the standard required by section 68, was not tinged in any way by bad faith or active opposition to the grievor himself.* I am not prepared, in the circumstances, to assume that the union will not provide proper representation to the grievor should the matter proceed to arbitration. This is consistent with the Board's jurisprudence. The Board stated in *Phillip Wayne Bradley*, [1983] OLRB Rep. June 865, at paragraph 3:

... Where the Board does grant such remedy [arbitration], it does not always make an order as to representation at such arbitration. The Board has normally specified who must represent the grievor at an arbitration it directs, as a result of a section 68 proceeding, where there are ongoing, serious concerns that the complainant will not receive a non-arbitrary, non-discriminatory, good faith treatment by the [union] in the course of its presentation of the arbitration (see, for example, *Leonard Murphy*, [1977] OLRB Rep. March 146, the first reported decision where such an order is made). When the Board has made an order concerning representation at arbitration, the nature of the order has been that the union and the grievor jointly select a lawyer to handle their presentation (see *Leonard Murphy*, *supra*; *Bedard Girard*, *supra*) .... An order for separate, independently selected legal counsel would be highly extraordinary. A remedy under section 68 should not change the essential character of the arbitration process. The respondent [union] is the party to the collective agreement and the arbitration not the grievor (*General Motors of Canada v. Brunet*, [1977] 2 S.C.R. 537) and would have, except for a violation of section 68, had exclusive selection over whether the arbitration was to proceed and how. The interests of a bargaining agent and the grievor are united before an arbitration board. Jointly selected counsel has been ordered only where the Board feels there would be no truly united representation of the arbitration case for the respondent and the grievor. The joint selection process is to ensure that this unity is restored. The *exclusive* selection of legal counsel would effectively remove the essential unity of the grievor's and union's interests at arbitration.

If indeed the union fails to comply with its duty of fair representation at the arbitration stage, it will expose itself to another complaint before the Board, and the complaint, if proven, will be remedied.

[emphasis added]

10. Finally, the request for reconsideration asks that "the Board remain seized of this particular matter with respect to the arbitration procedure in order that the Board may intervene should the union not fairly represent Mr. Glykis' interests during the course of arbitration". The Board in its decision found a violation of the Act and fashioned a remedy to respond to it. If there is a failure to comply with that order, procedures are available to enforce the Board decision. The Board is not prepared to go beyond this, and remain seized, in order to deal with speculative future violations of the Act. As indicated above, if the union fails to represent the complainant at arbitration in accordance with the duty in section 68, it can be the basis for a separate unfair labour practice complaint. It is unnecessary for me to remain seized in anticipation of possible future breaches of the Act.

4. Prior to the release of the Board's decision with respect to the reconsideration request, the union proceeded to afford the complainant an opportunity to present his case for proceeding to arbitration to the executive board and the general membership meetings, as directed by the October 31 board decision. These meetings are discussed at length, *infra*. It is sufficient to here note that the membership meeting voted to proceed to arbitration. The complainant, however,



still wished to be represented by his own counsel at that arbitration hearing with the costs to be borne by the union. When the union refused that request, the complainant filed the present complaint on March 8, 1985.

7. After reviewing the facts and some of the Board's relevant section 68 jurisprudence, the Board in the Tacon decision set out its conclusions. Given the nature of the arguments made in the present complaint it is appropriate to refer to these conclusions at length:

8. The Board now turns to the complainant's testimony. The Board does not lightly find that a witness has deliberately been untruthful. In this case, that conclusion is clearly justified. The complainant testified *after* having heard Kapelos and Herdman give their evidence. It was apparent that the complainant was tailoring his "story" to integrate his version with theirs and deal with any difficulty their testimony, particularly Herdman's, had caused. The complainant was evasive, "didn't remember" or was blatantly self-serving whenever questions on cross-examination touched on matters which showed him in a poor light. For example, the complainant told the membership meeting he wanted his own counsel because he didn't trust the union counsel (A. Ryder, Q.C.) or anyone from that firm because he had lost an arbitration decision in 1981 where he was represented by a junior as Ryder was unavailable at the last moment. When queried as to Arbitrator Teplitsky's express finding in that hearing that the complainant was not a credible witness, the complainant suggested he hadn't really read the award thoroughly and that Arbitrator Teplitsky had in some way acted improperly. The Board could recount additional examples of evasion, selective perception, "tailoring" of evidence and outright fabrication but it is unnecessary to do so. In short, the Board is not prepared to give any credence to the complainant's testimony.

...

22. In the Board's view, there is simply no basis on which to conclude the executive board exhibited any subjective ill will or hostility toward the complainant in considering anew his grievance, in accordance with Vice-Chairman Murray's October decision. With respect to the December 13 executive board meeting, complainant's counsel was given proper notice. He and the complainant were permitted to make whatever submissions they wished to the executive board. The executive board then considered those submissions and recommended against proceeding to arbitration. On the evidence, there was no impropriety in reaching such a decision. Sufficient notice of the January 8 membership meeting was given to the complainant's counsel. The Board does not regard the requirement imposed on the complainant to pay the standard fee to become a member in good standing where the complainant had not paid the usual union dues for some time as in any way out of the ordinary. Indeed, the executive board accommodated the complainant in two respects. Firstly, Pineo agreed the complainant could pay the reinstatement fee at, rather than prior to, the membership meeting. Secondly, Belanger readily agreed to Kapelos' request to suspend the regular order of business to consider the complainant's grievance first. Such accommodations are just not suggestive of ill will directed by the executive board toward the complainant.

23. The January 8 meeting itself followed the usual procedures. Belanger carried out his agreement with Kapelos to suspend the regular order of business by seeking the appropriate motion from the floor. There was nothing improper in directing Kapelos to remain in the corridor until the complainant's case was to be considered. Kapelos was permitted to fully address the membership. The executive board presented their recommendation, and their reasons, openly. There is nothing sinister or improper in reading from Vice-Chairman Murray's decision or the union's submissions to the Board. Indeed, when Kapelos objected that this was somehow a "misrepresentation", he was permitted to again fully address the membership. Indeed, and of considerable significance, when Belanger was faced with a motion to uphold the executive board's recommendation right after Kapelos' initial representations, he ruled it was not yet proper to vote on the motion in order to permit full discussions and questions from the floor. Belanger did not seize upon an opportunity to force a vote on a motion "favourable" to the executive board; rather, he encouraged fuller discussion. Such conduct is the antithesis of "bad faith". Indeed, when the membership voted to proceed to arbitration, the executive board simply accepted the result. Subsequent to the vote, Kapelos and the complainant raised the "solicitor" issue. As noted earlier, the Board accepts the accounts of Herdman and Belanger, not

Kapelos and the complainant, with respect to the meeting. Belanger's statement that the matter was out of order accorded with past practice in referring monetary matters to the executive board first. Whether or not formally included in the union's constitution, that was the past practice as supported by the uncontradicted evidence of Herdman, the complainant's own witness and Belanger. When the exchange became heated, Belanger was amenable to Herdman's suggestion that he (Belanger) and Kapelos meet subsequently to discuss the matter. In short, the Board finds there was no violation of section 68 in the conduct of the January 8 meeting, nor, in fact, in the entire dealing by the executive board with the complainant's grievance subsequent to Vice-Chairman Murray's October decision.

24. Nor is there evidence of bad faith in Pineo's letter of January 22 permitting the complainant to have his own counsel provided the complainant paid the fees. As Belanger explained, the union intended to have its own counsel at the arbitration; the complainant, however, could have his representative in addition. The union's reasons for wishing its own counsel were outlined in Ryder's February 7 letter, as well.

25. It is also appropriate for the Board to deal briefly with other positions taken by counsel for the complainant. In the notice of the executive board meeting of December 13, 1984, the word "appeal" was used in connection with consideration of the complainant's grievance. Kapelos objected to the use of the term as implying a restricted review of the initial decision. On the evidence, it is clear that the executive board intended a "fresh look" at the grievance. The executive board considered the matter on a "*de novo*" basis. There is no evidence supporting a suggestion that the grievance was "appealed" in a technical legal sense. Secondly, it was suggested that there was impropriety in the executive board's "failure" to call Kapelos back for further submissions. Again, the evidence plainly establishes that Kapelos was given every opportunity to make his submissions, that the executive board considered those submissions in the context of their review of the grievor's work record and at no time indicated that there would be an opportunity for further submissions. This asserted ground for contravention of section 68, then, fails. At another point, complainant's counsel argued the notice of the January 8 membership meeting was inadequate and "therefore" a violation of section 68. This assertion, as well, is not supported by the evidence. The complainant and his counsel attended the meeting and made submissions without indicating any prejudice whatsoever resulting from the notice. Further, since both had made representations on the grievance at the December 13 executive board meeting, it is difficult to conceive of any prejudice from alleged inadequate preparation time, especially since the complainant argued throughout that one ground for having his own counsel at arbitration was because counsel was so familiar with his case. The Board, finally, finds no merit in counsel for the complainant's statement that a violation of Robert's Rules of Order, if one occurred when Belanger released himself from the chair to respond to a question, constitutes, in itself, a violation of section 68. Firstly, complainant's counsel did not introduce Robert's Rules of Order into evidence. Moreover, the procedure adopted by Belanger was, in the circumstances of a meeting of lay persons, entirely sensible.

26. Thus, there is no credible evidence of ill will, bad faith or discrimination in the present complaint. Nor, was there such evidence in the former complaint. That original complaint merely held that the complainant, because critical job interests were at stake, should have been given notice of the executive board and membership meetings sufficient to allow an effective opportunity to present his case. There is no suggestion in the original decision that the inadequate notice was motivated by ill will, bad faith or discrimination. Indeed, the Board's characterization of the matter as a lack of "common courtesy", although amounting to gross negligence in the circumstances, underscores the absence of ill will, bad faith or discrimination. The remedy in the original complaint gave the complainant the opportunity he had missed and, moreover, the membership voted to proceed to arbitration.

27. The Board has found that the complainant has not established a violation of section 68. The Board, then, need not deal with the remedy urged by the complainant's counsel that the complainant be permitted to select his own counsel in respect of the arbitration hearing with the costs to be borne by the union. However, the Board has some comments on this issue. The complainant and his representatives have pursued this remedy with single-minded determination from the outset of the first complaint through the reconsideration request, the executive board meeting, the membership meeting, correspondence and in-person representations subsequent to that meeting and, lastly, in the instant complaint. In that single-minded pursuit, the complainant

has been prepared to bend the truth and mislead the Board. Before this Board, there was even the suggestion that, if the union continued to refuse the complainant's demands and the arbitration failed, there could be yet another complaint filed with the Board. The Board in the former complaint (and on reconsideration) rejected the complainant's request that he be allowed to select his own counsel. The union has retained counsel highly experienced in the labour field and who has not had prior dealings with the complainant. To the extent the complainant was concerned about getting a "top drawer" lawyer, those concerns have been satisfied.

...

30. For the foregoing reasons, the Board has concluded that the union has not contravened the duty of fair representation imposed by section 68 of the Act. As stated in the decision of May 27, 1985, the complaint is dismissed.

8. A review of the arbitration award discloses that the hotel relied on an incident which took place between Glykis and a hotel guest inside the hotel lobby on October 14, 1983 as a culminating incident, as well as the complainant's disciplinary record, in order to support its decision to terminate Glykis' employment. The only witness called by the hotel who had observed the incident inside the hotel was F. George, a bellman and union steward. The arbitration award refers to the evidence given by George. A portion of that award which relates George's observations concerning the complainant's conduct towards the guest inside the hotel is as follows:

... He did note, however, that both were "hot under the collar"; that the grievor was not yelling, but was irate. He concluded the grievor was not polite at all; he was discourteous. In his view, as it was a "slow night" and there were plenty of parking places, the grievor had upset the guest for no reason whatsoever. More importantly, Mr. George said that if he had acted as Mr. Glykis had done he would not expect to keep his job. ...

9. Glykis testified at the arbitration proceeding. That portion of the arbitration award which summarizes Glykis' evidence is as follows:

Mr. Glykis was the only witness called by the union. He agreed he worked on the evening in question. He stated it was a busy night and the only unusual thing he could recall about it (except that he was fired) was related to his assistance to Mr. DiCarlo who was helping a guest. Mr. Glykis stated that the guest was giving Mr. DiCarlo "a hard time" regarding his leaving his car keys with Mr. DiCarlo. Because they worked together, Glykis stated he felt he should assist Mr. DiCarlo. Therefore, he took it upon himself to talk to the guest and explain that, because of problems with fire regulations, the guest's car could not remain where it was and that if it did so Mr. DiCarlo's job would be in jeopardy. For his troubles, he stated the guest told him to mind his own business, using a not unknown obscenity in the process. He then went into the hotel. Seeing the same guest ten minutes later, he again tried to explain; but was again rebuffed. Later, however, he again saw the guest. On this occasion the guest apologized and said his problems were with the other doorman. This event occurred early in the evening. He could not recall anything happening towards the close of his shift.

10. The arbitrator preferred the evidence given by George to that given by Glykis. The arbitrator determined that Glykis' conduct was incompatible with the role of a doorman thereby exposing himself to discipline. Although the union argued that the hotel did not utilize a progressive disciplinary approach, the arbitrator concluded that Glykis' record was deplorable, that the decision of the hotel to terminate Glykis was fully justified and dismissed the grievance.

11. This brings us then to the evidence called during the hearing of the present complaint. Glykis and D. DiCarlo testified in support of the complainant. Counsel for the union objected to the relevancy of any evidence DiCarlo could give and, after considering the parties' representations on this point, the Board ruled that the complainant could call DiCarlo as a witness. C. Paliare was called to give evidence by counsel for the union.



12. In his evidence, Glykis indicated that he had discussions with Paliare prior to and during the course of the arbitration proceeding in which he asked Paliare to call DiCarlo as a witness. He testified that he thought the matter important enough that he instructed Paliare on three or four occasions to call DiCarlo to testify. Glykis indicated that Paliare gave him the impression DiCarlo would be called to testify but by the end of the case the union had only called himself to give evidence and surprisingly, not DiCarlo. Glykis denied that he had any confrontation inside the hotel with a guest. It was his evidence that there was an incident outside the hotel but that that incident occurred between the guest and the other doorman, DiCarlo. In cross-examination, Glykis denied that Paliare offered him any explanation for not calling DiCarlo. Subsequently, Glykis testified that Paliare did advise him that any evidence DiCarlo could give would be irrelevant. Glykis denied having any discussion with the guest in the hotel. Glykis testified that Paliare was friendly, that he had had no difficulty with him personally and that when the arbitration hearing finished, Glykis thanked him for his assistance. Glykis conceded that he did not complain about the union's failure to call DiCarlo until after he discovered his discharge grievance was dismissed.

13. DiCarlo's evidence was extremely brief. He testified that he was involved in an incident outside the hotel with a guest and Glykis. DiCarlo did not indicate that he witnessed any incident inside the hotel. Counsel for the union admitted that DiCarlo could have been called as a witness.

14. Paliare, a partner in the law firm of Gowling & Henderson, gave evidence which differed considerably from the evidence given by Glykis. He stated that he was asked to act as counsel for Local 75 at the arbitration since A. Ryder, the lawyer who usually acts for Local 75, had represented Local 75 during the first section 89 complaint filed by Glykis. Paliare indicated that this was possibly only the second time he acted for Local 75. The only instruction he had been given by the union was to do his best for Glykis and, if possible, to win the case. Paliare stated that he viewed his role in the arbitration as acting as a representative of Glykis and, therefore, he was getting his instructions from Glykis. Paliare admitted that Glykis asked him to call DiCarlo as a witness on a number of occasions. When Glykis first raised the matter during one of their meetings, Paliare responded by saying that he would be happy to call DiCarlo if his evidence would advance the case. When it became clear that the only incident the hotel was relying on as the culminating incident was an incident inside the hotel which occurred between Glykis and a guest, Paliare advised Glykis that there was no point in calling DiCarlo. Paliare testified that on more than one occasion he explained to Glykis that DiCarlo's evidence was not relevant since, according to Glykis, DiCarlo did not witness what had occurred inside the hotel. Paliare expressed to Glykis a concern that by calling DiCarlo to testify about what occurred outside the hotel, the hearing would be expanded unnecessarily. Paliare stated that up until the end of the hotel's case, Glykis wanted him to call DiCarlo. But by the end of the hotel's evidence, when it became obvious that the hotel only relied on an incident inside the hotel, Glykis understood and accepted Paliare's rationale for not calling DiCarlo and agreed that DiCarlo's evidence would not help his case.

15. After considering the usual factors in assessing credibility and what appears to the Board to be reasonably probable when all the circumstances are considered, the Board preferred the evidence given by Paliare where that evidence was in conflict in any material way with the evidence given by Glykis. In giving his evidence in support of this complaint, Glykis testified that he did not have any discussion with the guest inside the hotel. A review of the Murray decision and the arbitration award reveals that in those proceedings Glykis testified that he did have a conversation with the guest inside the hotel. Glykis' evidence in the present complaint was not internally consistent since he initially stated that Paliare gave him no explanation for not calling DiCarlo but later said that Paliare did tell him that any evidence DiCarlo would give would be irrelevant. The Board is satisfied that Glykis only raised the issue of the union's failure to call DiCarlo when he discovered that his discharge grievance had been dismissed. This fact, along with Glykis' evidence

that he got along well on a personal basis with Paliare and congratulated Paliare at the completion of the arbitration proceeding are matters which lead one to seriously doubt the complainant's veracity when he testified that Paliare refused to call DiCarlo against his wishes. The Board is satisfied that Paliare discussed with Glykis the issue of calling DiCarlo on a number of occasions, and that by the end of the hotel's case, Glykis agreed with Paliare that it was unnecessary to call DiCarlo to testify since DiCarlo had not observed what occurred inside the hotel between Glykis and the guest.

16. The Board now turns to the question of whether Local 75 contravened section 68 of the Act in the circumstances of this case. Counsel for the complainant argued that, at least from the time the complainant was discharged, the history of the relationship between Glykis and Local 75 can be characterized as bitter. It was argued that the union had a duty to call everyone who could shed some light on the incident giving rise to the complainant's discharge. Counsel submitted that the decision not to call DiCarlo was made in the context of a bad relationship and that the decision gave rise to a reasonable apprehension of arbitrariness. Counsel for the hotel and counsel for Local 75 requested the Board to dismiss the complaint. Counsel for the hotel argued that this was an appropriate case for the Board to direct the complainant to pay the hotel its costs for the proceeding.

17. Section 68 of the Act provides as follows:

A trade union or council of trade unions, so long as it continues to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

18. The Board has not interpreted section 68 of the Act in a way which requires a trade union to act in a particular way merely to accommodate an employee's wishes. Subject to the section 68 duty, decisions concerning the processing and settlement of grievances and the way in which grievances are arbitrated are decided exclusively by the trade union. In making decisions concerning representation matters, the duty only requires that the trade union act in a manner which is not arbitrary, discriminatory or in bad faith. The Board comments on the nature of the obligation found in section 68 of the Act in the following paragraph from *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067:

36. Section 68 requires that each trade union decision be grounded on a consideration of relevant matters, free from the influence of irrelevant considerations. The requirement that a trade union not act in a manner which is in bad faith protects the legitimate expectation that an individual employee's bargaining agent will act honestly and free of any personal animosity toward him. The requirement that a trade union not act in a discriminatory manner protects against the making of distinctions between employees and groups of employees on bases which have no relevance to legitimate collective bargaining concerns. "Bad faith" and "discriminatory", therefore, test for the presence, in the process or results of union decision-making, of factors which should not be present. "Arbitrary", on the other hand, describes the absence in decision-making of those things which should be present. A decision will be arbitrary if it is not the result of a process of reasoning applied to relevant considerations. The duty not to act arbitrarily requires a trade union to turn its mind to the matter at hand.

19. It was not alleged by the complainant nor was there any evidence to suggest that the decision not to call DiCarlo as a witness at the arbitration hearing was discriminatory. The Board was also satisfied that the decision was not arbitrary or made in bad faith.

20. Although counsel for the complainant appeared to suggest that the decision not to call DiCarlo was tainted with bad faith as a result of the previous dealings between Glykis and Local



75, the evidence does not support the conclusion that Local 75 or that Paliare had any ill will towards the complainant. The comments of the Board quoted above from paragraph 26 of the Tacon decision indicate quite clearly that the Board found there was no evidence of ill will, bad faith or discrimination on the part of Local 75 in the first or second complaint. With respect to the arbitration proceeding, it is clear that Paliare took his instructions from Glykis and the only instruction he received from Local 75 was to do his best to win the grievance. Paliare did not act as counsel for Local 75 in the earlier section 89 proceedings. In his own evidence, Glykis states that he and Paliare got along well personally. When reviewing these matters, the Board concluded that there was no evidence which would support an allegation that the respondent acted in bad faith in its representation of the complainant at the arbitration proceeding.

21. Paliare's decision not to call DiCarlo was a judgement call based on his training and experience as a lawyer together with his understanding of the particular circumstances of the case before him. It was his view that any evidence DiCarlo could give relating to what happened outside the hotel would not be of assistance to Glykis when the hotel was relying on only what occurred inside the hotel between Glykis and the guest. Paliare discussed whether to call DiCarlo with Glykis on more than one occasion and explained why it was unnecessary to call DiCarlo as a witness. The decision not to call DiCarlo was not made on the spur of the moment, nor without a consideration of the case Local 75 had to meet. By the completion of the hotel's case, Glykis appreciated Paliare's reasoning and agreed that DiCarlo should not be called as a witness. The decision not to call DiCarlo was not made in an arbitrary fashion. In fact, when one reviews all of the circumstances, the Board is satisfied that the decision not to call DiCarlo was not only made with an absence of bad faith, discrimination and arbitrariness, but was the correct decision. Having heard the evidence DiCarlo presumably would have given at the arbitration hearing if he had been called, the Board is satisfied that such evidence would not have affected the result in that case. It is clear from reading the arbitration award that the grievance failed because the arbitrator believed George's and not Glykis' evidence relating to the events which occurred inside the hotel.

22. Having considered the submissions of counsel for the hotel, the Board is not persuaded that in the circumstances of the instant case it should depart from the Board's well-established practice of declining to award costs (see *Silknet Limited*, [1983] OLRB Rep. Nov. 1913). Accordingly, the employer's request for costs is denied.

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**3287-86-R Ontario Public Service Employees Union, Applicant v. Grand River Conservation Authority, Respondent**

**Bargaining Unit - Certification - Whether Area Superintendents who are in charge of conservation areas exercise managerial functions - Area Superintendents supervising seasonal employees - Board analyzing phrase "students employed during the school vacation period" - Not all seasonal employees students - Exercise of managerial functions with respect to non-unit employees a relevant factor - Area Superintendents exercising managerial functions**

**BEFORE:** Owen V. Gray, Vice-Chair, and Board Members R. W. Pirrie and A. HersHKovitz.

**APPEARANCES:** Alick Ryder and Sandra Laycock for the applicant; Donald Francis, Ron Fox and Art Hulks for the respondent.



## DECISION OF THE BOARD; March 21, 1988

1. This decision addresses the issues which remain outstanding in the certification application, namely:

1. Whether 15 "Superintendents" employed by the respondent exercise managerial functions within the meaning of clause 1(3)(b) of the *Labour Relations Act* ("the Act") and, so, would remain excluded from the bargaining unit for which the applicant was granted interim certification in this panel's decision dated March 25, 1987.
2. Whether the phrase "save and except managers and persons above the rank of manager" in the description of the unit for which the applicant has been granted interim certification should be replaced by the phrase "save and except Superintendents and persons above the rank of Superintendent" in the description of the unit for which the applicant is to be granted a final certificate.

2. The parties exchanged statements of material fact and documents relied upon with respect to these issues in response to a direction in our decision of March 25, 1987. In a decision dated July 23, 1987, we observed that:

6. The material exchanged in accordance with our earlier directions did not result in agreement on all (or even very many) of the facts relevant to the issue whether any or all of the "Superintendents" in dispute exercised managerial functions within the meaning of clause 1(3)(b) of the Act as of the application date. In view of the amount of testimony which may have to be collected with respect to factual issues still in dispute, the parties agree that a Labour Relations Officer should be appointed to inquire into and report to the Board on the duties and responsibilities of the individuals in dispute as of that date, before we determine whether the word "manager" in the unit description in paragraph 2 hereof will be replaced by "Superintendent" in finalizing the description of the appropriate unit in the full-time application. (It should perhaps be noted that that would not necessarily be the result of a finding that some or all "Superintendents" were "managers" on the application date. We would still be bound to ask whether "manager" is not the better word to use in whatever circumstances may be revealed by the evidence.)

In accordance with the agreement referred to in that passage, we then appointed a Labour Relations Officer ("LRO") to inquire into and report to the Board on the duties and responsibilities as of the application date of the 15 "Superintendents" whose "managerial status" was in dispute. The LRO convened meetings of the parties in August and September, 1987, during which three of the 13 "Area Superintendents" in dispute (Messrs. Cunningham, Sherritt and Muir) were examined as to their duties and responsibilities as at the application date. The applicant and respondent then agreed that the evidence adduced in the examinations of those three persons is representative of the duties and responsibilities of the other Area Superintendents in dispute. The other Superintendents in dispute are Ronald Bloomfield, described as "Superintendent, Head Office", and Gerry Brousseau, described as "Superintendent, Small Dams". With respect to those persons, the parties agreed that their dispute could be resolved without conducting an examination. The terms of that agreement are described later in paragraph 23 of this decision.

3. In the course of the LRO's inquiry, counsel for the applicant sought to introduce evidence with respect to the duties and responsibilities of persons classified as "Interpreter", whom the parties had agreed would fall within the unit for which the applicant is to be certified. The applicant argued that such evidence would be relevant to the outcome because of similarities between the position of "Interpreter" and the position of "Area Superintendent". The LRO took the view that such evidence would not fall within the scope of the inquiry which she had been

authorized to conduct. In a decision dated November 12, 1987 (and reported at [1987] OLRB Rep. Nov. 1371), we agreed that if evidence with respect to the duties and responsibilities of Interpreters was relevant to the outstanding issues, a matter we did not propose to then decide, such evidence was not within the scope of the inquiry which we had authorized and directed the LRO to conduct. The possibility of our expanding the scope of the LRO's inquiry or by other means considering evidence with respect to the duties and responsibilities of Interpreters was expressly left open for consideration at a hearing to be held after the LRO's report on the three individuals examined had been completed and circulated. That hearing was later scheduled for and took place on February 10 and 11, 1988. Counsel for the applicant then chose not to pursue his request that the Board receive evidence about the duties and responsibilities of Interpreters.

4. Subsection 1(3)(b) of the *Labour Relations Act* provides:

1.-(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

...

- (b) who, in the opinion of the Board, exercises managerial function or is employed in a confidential capacity in matters relating to labour relations.

The principles considered by the Board in formulating its opinions under this provision have been reviewed at length on a number of occasions. The Board's decision in *The Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121, was referred to in argument. Paragraphs 2 through 7 of that decision contain a useful summary of the Board's jurisprudence, as do paragraphs 8 through 13 of the Board's decisions in *Ottawa General Hospital*, [1984] OLRB Rep. Sept. 1199 and paragraph 5 in *The Royal Ontario Museum*, [1985] OLRB Rep. Feb. 325. In coming to our opinion in this matter, we have considered the principles referred to in those decisions and in the decisions to which they refer.

5. The respondent (sometimes referred to hereafter as "the Authority") is a body corporate governed by the *Conservation Authorities Act*, R.S.O. 1980, c.85, as amended, with responsibility for managing the water and related land resources of the Grand River watershed, which covers an area of approximately 6,700 square kilometers. The Authority is involved in the construction, operation and maintenance of capital works to control flood and erosion hazards and other resource problems in the watershed. It regulates land use in flood plains and erosion hazard areas and in wetland areas, and reviews water-related aspects of municipal planning documents. It is also involved in the acquisition and management of lands for water control and outdoor recreation. In that regard, it maintains a number of conservation areas which are located at distances of up to 200 miles from the Authority's administrative offices in Cambridge. These conservation areas are open to the public from late spring until early fall each year. Each conservation area offers swimming in pools or lakes, playground facilities, picnic areas and hiking trails. Most also provide serviced and unserviced camping areas. Some conservation areas are also open during winter months for cross-country skiing or snowmobiling.

6. The Authority has a complement of approximately 170 "regular" (year-round, permanent) employees. This is augmented in the summer months by an additional 300 "seasonal" employees hired to work in the conservation areas. A smaller number of seasonal employees are also hired to work at certain of the conservation areas during the winter months. Some of these seasonal employees are hired pursuant to government-funded employment programs.

## The Area Superintendents

7. Each Area Superintendent is a regular employee who works at and is in charge of one of the Authority's conservation areas. The precise job functions of an Area Superintendent vary from area to area, as do the numbers of other regular and seasonal employees employed in a particular conservation area. As we have already noted, the applicant and respondent agreed that the evidence of three Area Superintendents would be taken as representative of the job functions of all 13 Area Superintendents in dispute. Each of the three Area Superintendents examined had somewhat different job functions, different experiences in the exercise of those job functions and different views about his relationship with others of the respondent's employees. To give effect to the parties' agreement that the evidence of these three Area Superintendents be taken as representative of the job functions of all Area Superintendents, we have synthesized from their testimony a composite picture of the position of Area Superintendent at the time the application was filed: see *The Royal Ontario Museum, supra*, at paragraph 16. We do not propose to paint that picture in this decision in great detail; rather, we will simply touch on those features of that picture which were of particular significance to the conclusion at which we have arrived.

8. In his or her conservation area, the Area Superintendent works with one or two other regular employees: an "Assistant Superintendent" and, perhaps, a "Lead Hand". These two or three regular employees may be the only employees working at the conservation area during the winter months. In the summer months, however, the work force at the conservation area will be augmented by more than a dozen seasonal employees. The Area Superintendent's duties and responsibilities in relation to other regular employees do not involve any significant management functions. The same cannot be said for their duties and responsibilities in relation to seasonal employees.

9. A position description for Conservation Area Superintendent formulated less than six months prior to the application date describes the duties and responsibilities of that position as including the making of recommendations to the Conservation Areas Co-ordinator and Safety Officer with respect to employment and discharge of casual employees. The evidence establishes that the Area Superintendent's recommendations with respect to casual employees are "effective" in the sense described in the Board's jurisprudence with respect to subsection 1(3)(b). Indeed, it appears that the acceptance of such recommendations is so much a formality and a foregone conclusion that the Area Superintendents act and are permitted to act as though they actually exercise the power to hire and dismiss casual employees.

10. Each year, each Area Superintendent prepares a budget for the operations of the area of which he or she has charge. This involves decisions by the Area Superintendent about the number of seasonal employees to be hired and the length of employment and rate of pay of each seasonal employee. The senior management of the Authority will set the amount which can be spent on that area, and the Superintendent may have to adjust his initial budget to conform with that determination. While the Area Superintendent's budgetary decisions are circumscribed by practical and economic considerations and by the policy guidelines promulgated by senior management, the range of discretion left to Area Superintendents is significant from the perspective of seasonal employees, particularly those "returnees" who have previously been employed by the Authority on a seasonal basis. For example, the evidence discloses that while senior management does consider it legitimate to pay returnees at a higher rate than that paid to seasonal employees not previously employed by the Authority, the Area Superintendents have a discretion in that regard. At least one Superintendent has chosen not to pay returnees at a greater rate than new hires.

11. The Area Superintendent is involved in the training and supervision of seasonal



employees and devotes roughly one-half of his or her time to those supervisory duties during the summer season. The balance of his or her time will be spent on administrative duties and on "hands on" work similar to that performed by others in the bargaining unit, particularly work for which greater skill and training is required, such as the operation of dams. Area Superintendents have the power to impose discipline in the form of oral or written warnings and suspensions of up to several days duration without prior reference to any higher authority. As we have already observed, they also have the *de facto* power to dismiss, notwithstanding that the Authority's personnel policies appear to reserve that power to senior management. While Area Superintendents do not appear to prepare formal written appraisal reports on seasonal employees, they do appraise the employees as they work with them. Because they make the effective hiring decisions, their personal appraisal of a seasonal employee during one season will have a considerable influence on whether a subsequent application by that employee for seasonal employment in the same area will be accepted.

12. The Area Superintendent's job functions are different outside the period during which seasonal employees are engaged in significant numbers. During the winter months, the Area Superintendent spends the most of his or her time on "hands on" work, administrative responsibilities and those year-round minor supervisory and reporting functions in relation to the regular employees which would not, by themselves, amount to the exercise of managerial functions. Their role with respect to seasonal employees does not disappear, however; the budget preparation and revision process and, later, the interviewing and hiring process all take place during this off-season.

13. In short, Area Superintendents exercise some degree of control over other employees, but also perform what might be described as bargaining unit work. The situation of such persons was discussed by the Board in *Falconbridge Nickel Mines Limited*, [1966] OLRB Rep. Sept. 379, at paragraph 29:

Most of the persons in dispute have more than one function and generally speaking it is the weight or emphasis attached to the different functions which must determine on which side of the managerial line the persons fall. Senior or skilled employees often have more responsibilities than other rank and file employees and they exercise certain control and direction over the other employees because of their greater experience and skill. It is the Board's difficult task to determine whether the additional responsibilities are managerial functions within the meaning of section 1(3)(b) of the Act or are merely incidental to the prime purpose for which the employee is engaged (i.e., to perform work properly performed by persons within the bargaining unit). If the majority of a person's time is occupied by work similar to that performed by employees within the bargaining unit and such person has no effective control or authority over the employees in the bargaining unit but is merely a conduit carrying orders or instructions from management to the employees, the person cannot be said to exercise managerial functions within the meaning of section 1(3)(b) of the Act. On the other hand, if a person is primarily engaged in supervision and direction of other employees and has effective control over their employment relationship, even though the person occasionally performs work similar to the rank and file employees when an emergency arises or to relieve an employee during occasional periods of absence or even to perform a particularly important job requiring special skill and experience, such occasional work in no way derogates from his prime function as a person employed in a managerial capacity. When assessing a person's duties and responsibilities the Board does not look at any one function in isolation but views all functions in their entirety.

See also *Toronto East General Orthopaedic Hospital*, [1974] OLRB Rep. Oct. 671 at paragraph 5. In *McIntyre Porcupine Mines Limited*, [1975] OLRB Rep. April 261 at paragraphs 38 and 39, the Board made these observations:

38. It is noteworthy that this test, so not to be overly exclusionary, requires that a person be *primarily* employed in the direction and supervision of employees and, as well, possess effective control or authority over those employees....

39. But the "effective control" test has not been an easy concept to apply. When can it be said that one person exercises effective control over another? One who can discipline, discharge, transfer, promote, or demote another employee surely has such effective control. And with a similar certainty one who only incidentally supervises, instructs, reports, etc. does not. But between these extremes there is a vast penumbral area. In this shadowland a person may exercise only one or two managerial type functions or make recommendations that other decision-makers consider. Thus it is in this area that the Board has most often said it will look at the "totality" of the evidence in making its determination....

14. By way of reference to the totality of the evidence, counsel for the applicant relies on the following circumstances:

- (1) The apparently managerial functions exercised by Area Superintendents in relation to seasonal staff are qualitatively and quantitatively inconsistent with two official personnel documents of the Authority: its "Position Descriptions" dated 1986 and its "Staff Guidelines and Procedures", which appear to have been revised in 1986.
- (2) The seasonal employees are students who fall outside both of the units for which the applicant has been certified.
- (3) Many of the functions exercised by Area Superintendents in relation to seasonal staff are also exercised by Assistant Superintendents, whom the respondent has agreed would fall in the bargaining unit in this application.

15. The Board has repeatedly observed that job descriptions are generally of little assistance in determining whether a person exercises managerial functions. That is because subsection 1(3)(b) focuses on the functions actually "exercised" by the person in question. The more common situation is that a position description suggests that the job incumbent has considerably more managerial functions than would appear from the evidence to be actually exercised. This case presents the corollary: in relation to seasonal employees, the actual duties and responsibilities of the Area Superintendents appear to be more "managerial" than is contemplated by the employer's personnel documents. The documents might have some significance if it appeared that they reflected an active, ongoing attempt to "rein in" unauthorized action by Superintendents. That does not appear to be the case here. While the documents in question may post-date some of the incidents referred to in evidence, there is no suggestion that the current documents reflect any material change from prior job descriptions or staff guidelines and procedures as they relate to the control exercised by Area Superintendents over the respondent's employment relationship with seasonal employees. It appears that senior management has regularly acquiesced in what may appear to be departures from its written policies and job descriptions as regards the Area Superintendents' control over seasonal employees. Counsel for the Authority represented to us that it had no intention of strictly applying its personnel documents in that regard.

16. The second of the arguments noted in paragraph 14 above rests on the proposition that the casual employees in question are all "students employed during the school vacation period" (hereafter referred to simply as "students"). The unit with which we are concerned in this application consists of all employees of the respondent with certain exceptions. The exceptions include both students and persons regularly employed for not more than 24 hours per week ("part-time employees"). Those are common exclusions from a unit of full-time employees. This panel's finding that those exclusions were appropriate was based on their orthodoxy and the agreement of the applicant and respondent that the exclusions were appropriate in their circumstances. The applicant also applied for and was granted certification for a unit of part-time employees of the



respondent. The applicant and respondent agreed that students should also be excluded from that unit. That is less orthodox. We again acted on that agreement, however, without first requiring that the parties offer some justification for the exclusion of students from both units. During bargaining for their first collective agreement(s), the applicant and the respondent have also agreed to exclude from these bargaining units persons employed pursuant to job creation programs of the sort contemplated by section 38 of the *Unemployment Insurance Act*.

17. The evidence does not support the contention of counsel for the applicant that all seasonal employees are students. While it appears that a substantial majority of the seasonal employees are students, a not insignificant number of seasonal employees are persons who are not students and who would fall, therefore, within the bargaining unit. Even if the subsequent agreement to the "section 38 program" exclusion were relevant to a determination of the Area Superintendents' status as of the application date, it is not at all apparent that non-student seasonal employees would all fall within that exclusion. In this connection, we feel we should make two comments with respect to our exclusion of "students employed during the school vacation period". First, we used that phrase in its usual sense, to describe only those persons who are on vacation between one period of schooling and the immediately following period of schooling. We do not agree with counsel for the applicant that someone who has finished a period of schooling and does not intend to return to school when it resumes remains a "student" during the school vacation period unless and until he or she settles into a "full-time" or "permanent" job. Second, the evidence which has emerged in dealing with this "managerial functions" dispute gives us some retrospective concern about the exclusion of students from a unit which includes the equally seasonal non-student employees. We do not suggest that there could be no rational labour relations basis for the parties' agreement to exclude students. The evidence which emerged in connection with the managerial dispute may only have presented part of the picture with respect to the community of interest between student and non-student seasonal labour. It may be that other evidence would have emerged to justify the exclusion had the parties been required or invited to offer it. We do not propose to reconsider our decision with respect to exclusion of students. We only wish to observe that if we had known what we know now at the time we were asked to make that decision, we would have invited some explanation before acting on the agreement of the applicant and respondent.

18. Although it cannot be said that all of the seasonal employees over which Area Superintendents exercise control fall outside the bargaining unit in which the applicant would have us place those Superintendents, it is apparent that most of them do. Thus, the exercise of control by Area Superintendents over persons within the bargaining unit is a relatively small portion of their total duties. If the exercise of managerial functions in relation to non-unit employees were of no importance, the applicant's argument in this regard might carry some weight even though the factual premise on which it relies is not entirely correct. We do not agree, however, that the exercise of managerial functions with respect to non-unit employees is an irrelevant consideration. That proposition is not supported by *Carleton University*, [1975] OLRB Rep. June 500, the Board decision cited by counsel for the applicant.

19. In the *Carleton University* case, the Board considered whether departmental chairmen should be excluded from a unit of full-time university faculty members by reason of subsection 1(3)(b) of the Act. It concluded that they should not. The passage on which counsel for the applicant relies appears at paragraph 23 of the decision. There, the Board observed that:

... It is true, for example, that the Departmental Chairman has some independent discretion in the employment of the administrative staff and, possibly, summer lecturers. These persons, however, are not in the bargaining unit and we see no reason for excluding the Chairman on that ground. In our view, the infrequent exercise of authority over the office staff poses no danger of conflict of interest within the unit. *It is important to emphasize that the overwhelming pro-*



*portion of the Chairman's duties have nothing whatever to do with the supervision or control of the department's small clerical staff.* In this connection, we agree with the observation of the National Labour Relations Board in *Adelphi University*, 195 NLRB No. 107 at page 19; [1972] CCH NLRB ¶23,950:

"An employee whose principal duties are of the same character as that of other bargaining unit employees should not be isolated from them solely because of a sporadic exercise of supervisory authority over non-unit personnel."

[emphasis added]

As can be seen from this passage, while the fact that the supervised employees were not in the bargaining unit seems to have been of some significance, the most significant fact was that the exercise of control over those employees was a very small part of the job in question there. It cannot be said of the Area Superintendents that their exercise of authority over seasonal staff is infrequent, nor that the overwhelming proportion of the Area Superintendent's duties have nothing whatever to do with the supervision or control of those employees.

20. The applicant and respondent did agree at the outset that Assistant Superintendents would fall within the applicant's bargaining unit. The evidence establishes that the Assistant Superintendents perform many of the same functions as the Superintendents in the supervision of seasonal employees. One of the Superintendents testified that he had delegated to his Assistant Superintendent the job of interviewing and hiring the seasonal employees who would be engaged in their area as lifeguards. Another testified that interviews of applicants for summer positions might be conducted by himself, his Assistant Superintendent or possibly the lead hand if there was one in the area. Those examinees who thought they had the power to effectively dismiss a casual employee also thought their Assistant Superintendent could exercise that power as long as there was some consultation with him. The Assistant Superintendents are also involved in the supervision of and assignment of work to casual employees, although it is not clear that the Assistant Superintendent would spend as much of his or her time on those functions as does the Superintendent. While the Assistant Superintendent may play some role in the budgeting process, it is not apparent that he or she shares with the Superintendent any effective decision-making with respect to the number of casual staff to be employed, their rates of pay and the length of employment of each. Indeed, it does not appear to us that Assistant Superintendents make the effective decisions in those areas where "effective control" by the Area Superintendents is most clearly significant: decisions about the re-employment and rate of pay of "returnees" among the casual staff.

21. The exclusion from collective bargaining of persons who exercise managerial functions on behalf of an employer is, for the most part, an accommodation of the interest an employer has in ensuring the undivided loyalty of those whom it entrusts with the management of its enterprise and the conduct of its employment relationship with its employees. The question whether an employee with a particular set of duties and responsibilities would be said to exercise "managerial functions" within the meaning of subsection 1(3)(b) cannot be answered in a vacuum. In each case, the answer depends on the nature of the employer's organization and other aspects of the context in which the question arises. When an employer agrees that a particular position falls within a bargaining unit, that must be taken to signify either that those of its interests which subsection 1(3)(b) is intended to serve do not require the exclusion of that position or that the employer does not expect that the Board would form the opinion that the incumbents in that position exercise managerial functions as at the relevant time. Once one knows something about the job functions exercised by those incumbents, the employer's agreement says something about the nature of its organization and the context in which any other position comes into question under subsection 1(3)(b). For those reasons, we do not accept the proposition that the employer's agreement to inclusion of employees in one position in the bargaining unit can in no event have any relevance to the determi-

nation of a dispute about whether those in another position exercise managerial functions. We do agree, however, that the interest of the Board and the affected parties in the expeditious resolution of questions of that kind (by agreement, wherever possible) warrants a certain reluctance to expose the parties' agreements and the bases of them to searching analysis. An appropriate balance between these considerations is struck by requiring that the analogy between a disputed position and one on which the parties have reached agreement must be compelling before it will lead the Board to a conclusion different from the one at which it would have arrived but for the parties' agreement on the other position. On the evidence before us, the analogy offered between the Area Superintendents and their Assistant Superintendents does not meet that test.

22. We conclude that the Area Superintendents exercise managerial functions and would be deemed not to be employees in the summer months when they exercise effective control over casual employees of the respondent. We are not sure it makes much sense to say that they become employees during the winter months and, thus, oscillate in and out of the bargaining unit on a seasonal basis. Neither party suggested that as a possible outcome. Although the considerations which favour it are in almost equal balance with those which do not, we have come to the conclusion that, on the evidence before us, the Area Superintendents did exercise managerial functions within the meaning of subsection 1(3)(b) of the Act as of the date of application in this matter.

#### **The other "Superintendents" in dispute**

23. In addition to their dispute with respect to the 13 "Area Superintendents", the applicant and respondent disagreed about whether the Head Office Superintendent, Ronald Bloomfield, and the Superintendent of Small Dams, Gerry Brousseau, exercised managerial functions as of the application date. The Labour Relations Officer's report records that:

The parties agree that the facts set out in both the Applicant's and the Respondent's briefs with respect to Messrs. Bloomfield and Brousseau is sufficient to determine their status provided that the term "hiring" as used in the parties briefs shall be read and understood to be defined by the "hiring" duties and responsibilities testified to by Messrs. Cunningham, Sherritt and Muir.

The briefs referred to are the statements of material fact and documents relied upon which the parties exchanged as a result of our original direction of March 25, 1987.

24. There is no substantial inconsistency between the parties' descriptions of the position of Superintendent, Small Dams. The primary duties and responsibilities of that position involve the operation and maintenance of a number of dams. It is said that the Superintendent of Small Dams is involved in the hiring and supervision of three seasonal employees each summer and that, during the period of their employment, this Superintendent spends approximately 10% of his time supervising those employees. There is no suggestion that this position has the same budget formulation and wage determination powers as are exercised by the Area Superintendents.

25. From the parties' descriptions of "Head Office Superintendent", it appears that this person carries out day-to-day maintenance and care of the respondent's administrative offices and grounds and "supervises" the work of 5 similarly-occupied employees: a "mechanical assistant", a "custodial assistant" and three cleaning staff. The material is silent as to the relative proportions of time spent by this person on bargaining-unit work and on supervision of other employees. Other than a statement that the Head Office Superintendent is responsible for interviewing and recommending the hiring of applicants for positions under his supervision and that his recommendations have been followed in the past, there is nothing from which we could conclude that this Superintendent has "effective control" over the persons he supervises.

26. The *Labour Relations Act* is intended to extend collective bargaining rights to employ-

ees. It is incumbent upon any party seeking to exclude employees from the scheme of the Act to come forward with affirmative evidence that those persons exercise managerial functions: see *The Corporation of the City of Thunder Bay, supra*, at paragraph 6. The respondent is the person seeking to exclude the persons occupying the positions of Superintendent, Small Dams, and Superintendent, Head Office. The material on which it is content to have us determine that issue does not support our excluding those positions. Accordingly, we find that the incumbents of those positions did not exercise managerial functions within the meaning of subsection 1(3)(b) of the Act as of the application date.

### **The Bargaining Unit Description**

27. Although it may be said that substantially all of the positions which the respondent labels as "Superintendent" have been found to or were agreed to involve the exercise of managerial functions as of the application date, we are not persuaded that this label should be used in exclusionary language in the bargaining unit description. For one thing, not every "Superintendent" did exercise managerial functions as of the application date. With respect to the Area Superintendents, the balance of their duties and responsibilities was very close, and might change in the future as a result either of collective bargaining with respect to the present bargaining unit or the adoption by the respondent of a more centralized approach to determination of the employment and wages and working conditions of casual employees, particularly returnees. The Area Superintendents would not and should not remain outside the bargaining unit if the balance of their functions shifts so as to diminish the managerial aspects of their positions either quantitatively or qualitatively. The language we use to describe the bargaining unit will be the language which appears in the parties' collective agreement unless they can agree otherwise. If (as these parties agree) the question at this point is how to describe the first-line managerial position, we think it better in these circumstances to use a generic label rather than the name of a position which may or may not in future involve the exercise of managerial functions. Accordingly, we have determined that the appropriate bargaining unit in this application will be described as follows:

All employees of the respondent in the Cities of Cambridge, Brantford and Waterloo, the Towns of Dunville and Haldimand and the Townships of West Garafraxa, Peel, Pilkington, Guelph, East Luther, South Dumfries, North Dumfries, Brantford and Burford, save and except managers and persons above the rank of manager, professional and graduate engineers employed in an engineering capacity, office and clerical employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

In this description, the term "manager" describes a person to whom subsection 1(3)(b) of the *Labour Relations Act* applies. The Board has found that "Area Superintendents" were "managers" as of the application date herein, while the "Superintendent, Head Office" and "Superintendent, Small Dams" were not.

28. A final certificate shall issue with respect to the aforesaid bargaining unit.

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**2471-87-R International Brotherhood of Painters and Allied Trades Local Union 1891, Applicant v. Lay-All Drywall Ltd., Respondent**

**Bargaining Unit - Certification - Construction Industry - Dependent Contractor - Respondent asserting that appropriate unit should consist of dependent contractors working as painters in the construction industry - Board finding conflict between dependent contractor provision and province-wide bargaining sections in Act - Dependent contractors cannot constitute a separate bargaining unit - More than one provincial unit prohibited - Standard unit found appropriate**

**BEFORE:** *S. A. Tacon*, Vice-Chair, and Board Members *D. A. MacDonald* and *C. A. Ballentine*.

**APPEARANCES:** *L. Steinberg* and *T. Neil* for the applicant; *W. Thornton* and *B. Toms* for the respondent.

**DECISION OF THE BOARD; March 11, 1988**

1. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 2, 1978, the designated employee bargaining agency is the International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades.

2. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

3. The parties were in dispute with respect to the bargaining unit description. The applicant sought what may be characterized as the "standard" bargaining unit in such applications, namely:

All Painters and Painters Apprentices in the employ of the respondent in the Industrial, Commercial and Institutional Sector of the Construction Industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foremen.

All Painters and Painters Apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel

and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the Industrial, Commercial and Institutional Sector, save and except non-working foremen and persons above the rank of non-working foremen.

Clarity Note should be added to provide that Painters in the above bargaining unit includes Drywall Tapers.

The respondent asserted that the appropriate bargaining unit should read:

All dependent contractors working as painters and painters' apprentices for the Respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

All dependent contractors working as painters and painters' apprentices for the Respondent in the construction industry in OLRB geographic area #8, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

For the purpose of clarity, dependent contractors engaged in drywall taping are included in the bargaining unit.

4. The parties agreed to make submissions as to the appropriate bargaining unit on the assumption that all of the persons in question are dependent contractors. However, should the Board find that the respondent's proposed bargaining unit could be appropriate, the applicant retained the right to assert that the persons in question were not, in fact, dependent contractors. The submissions of the parties are next set out in somewhat abbreviated form.

5. Counsel for the respondent submitted that section 138 of the Act contemplates the applicability of provisions in the general section of the Act to province-wide collective bargaining situations, although providing for an "override" of those general provisions if there is conflict. It was argued that section 6(5) deemed a bargaining unit composed solely of dependent contractors to be appropriate and, apart from "mixed" units of employees and dependent contractors, (where the Board has a discretion subject to certain conditions), such a dependent contractors unit was mandatory. That is, counsel contended that, unless the Board found section 6(5) in conflict with the provisions dealing with the province-wide bargaining scheme, the Board had no discretion to refuse a dependent contractors unit. Counsel acknowledged that section 146 would require a single province-wide collective agreement with the applicant but asserted that section 146(1) did not prohibit more than one provincial unit represented by the applicant albeit bound by the same collective agreement. It was argued that the applicant could be certified in respect of employees [as distinct from dependent contractors] (if there were any, in fact, at present or in the future) in such a separate bargaining unit. Counsel's argument, as well, was predicated on a divergent community of interest between dependent contractors and employees as implicit in section 6(5) itself. In the alternative, counsel contended that the Board should find appropriate a "dependent contractors" bargaining unit for non-ICI work. In support, counsel referred to *Rolland Duquette Construction*, [1983] OLRB Rep. Nov. 1884; *Century Flooring Limited*, [1979] OLRB Rep. Aug. 737.

6. Counsel for the applicant stressed that the bargaining unit sought was the standard description for painters and painters' apprentices, that the applicant is part of the employee bar-

gaining agency and that the application is brought pursuant to section 144(1) of the Act. In counsel's view, section 144(1) is clear and specific with respect to the determination of the appropriate bargaining unit. That is, the bargaining unit is statutorily mandated as *all* employees who would be bound by a provincial agreement together with *all* other employees in at least one appropriate geographic area (with certain exceptions not relevant here). Given that the definition of "employee" in section 1(1)(i) of the Act includes a dependent contractor, counsel submitted that the combined effect of that definition, section 144(1) and 146 required that there be a single provincial agreement for *each* provincial unit represented but there could only be *one* such provincial unit. It was argued that section 6(5) was inconsistent with the provisions dealing with province-wide bargaining and, by virtue of section 138, section 6(5) could not prevail. Counsel distinguished *Century Flooring, supra*, on the ground that the application had not been brought under section 144(1) of the Act and referred to the following cases in support: *Hamilton Yellow Cab Company Limited*, [1987] OLRB Rep. Nov. 1373; *Clarence H. Graham Construction Limited*, [1981] OLRB Rep. Sept. 1195.

7. In reply, counsel for the respondent acknowledged that in *Clarence H. Graham Construction, supra*, the Board determined that section 6(1) could not co-exist with section 144(1) but asserted that, in the instant case, section 6(5) was more limited and, therefore, distinguishable as it covered a narrower grouping of persons rather than a narrowing of the trade designated.

8. Section 144(1) of the Act has already been set out at paragraph 2 and need not be repeated here. It is useful, however, to reproduce sections 6(5), 138 and 146(1):

6(5) A bargaining unit consisting solely of dependent contractors shall be deemed by the Board to be a unit of employees appropriate for collective bargaining but the Board may include dependent contractors in a bargaining unit with other employees if the Board is satisfied that a majority of such dependent contractors wish to be included in such bargaining unit.

138. Where there is conflict between any provision in sections 139 to 151 and any provision in sections 5 to 57 and 62 to 136, the provisions in sections 139 to 151 prevail.

146.-(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

9. The Board does not disagree with the analysis of the dependent contractor provision in *Hamilton Yellow Cab, supra*, (particularly at paragraphs 39-41). The issue in this case, though, is whether section 6(5) conflicts with any of sections 139 to 151. If so, as the respondent's counsel acknowledges, those latter sections would prevail over what would otherwise flow from section 6(5), by virtue of section 138 of the Act.

10. In the Board's view, there *is* such a conflict between section 6(5) and the combined effect of sections 144(1) and 146(1) given the definition of employee in section 1(1)(p) of the Act.

11. Sections 137 to 151 establish a comprehensive scheme for province-wide bargaining in the construction industry. Within that scheme, section 144(1) addresses, in precise language, applications for certification in the ICI sector in respect of the entity which is entitled to bring such an application and the bargaining unit description. The Board accepts the principle in *Clarence H. Graham, supra*, that a finding of appropriateness under section 6(1) or 6(2) must be made within the confines of section 144. Section 6(5) is itself a specific instance of a section 6(1) determination, that is, a situation in which the statute deems a specific grouping of persons (i.e., dependent contractors) an appropriate bargaining unit (with certain exceptions not relevant in this instance). Section 6(5) is not separate from 6(1) in the sense asserted by counsel for the respondent, namely, that section 6(5) falls outside the principles enunciated in *Clarence H. Graham, supra*. The reasoning in



*Clarence H. Graham, supra*, extends to section 6(5) as well. That is, section 6(5) must also be placed within the confines of section 144.

12. Section 144(1) stipulates that the bargaining unit “shall include *all* employees who would be bound by a provincial agreement ...”. The definition of “employee” includes a dependent contractor. Thus, the Board must include the category of dependent contractors with other employees in a single bargaining unit in order to comply with section 144(1). Dependent contractors cannot constitute a separate bargaining unit. Thus, the mandatory deeming of a bargaining unit consisting solely of dependent contractors as appropriate in section 6(5) conflicts with the mandatory bargaining unit description in section 144(1). Given such conflict, section 144(1) prevails over section 6(5) by virtue of section 138.

13. Section 146(1), in the Board’s opinion, cannot be read as the respondent’s counsel suggests, i.e., that the phrase “each provincial unit” does not prohibit more than one such provincial unit notwithstanding counsel’s concession that all of the units would fall under one provincial agreement. Such an interpretation, although grammatically possible, would raise the spectre of a multiplicity of bargaining units represented by a single employee bargaining agency but bound by a single provincial agreement. Legitimizing a multiplicity of such units would inevitably weaken the cohesion of the province-wide bargaining scheme by imposing an obligation on the employee bargaining agency to represent more than one bargaining unit each with a different community of interest yet bound, by section 146(1), to negotiate a single provincial agreement.

14. Nor does the Board accept the respondent’s alternative position that the Board should find appropriate a dependent contractors’ unit for non-ICI work. In the Board’s view, the reasoning in *Clarence H. Graham, supra*, precisely proscribes a combination, in one unit, of employees who would be bound by a provincial agreement together with employees performing non-ICI work, the former aspect determined under section 144(1) but the latter aspect [in this case] determined under section 6(5) of the Act [rather than 6(1) or 6(2) of the Act as in *Clarence H. Graham, supra*].

15. Thus, the Board finds that all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

For purposes of clarity, the Board declares that drywall tapers are included in the appropriate bargaining unit.

16. The parties were also in dispute with respect to the schedule of persons filed by the respondent. Further, the respondent raised allegations of misconduct on the part of the applicant in its organizing drive, set out in the respondent’s reply and letter dated January 8 and 18, 1988. The parties made representations as to the appropriate order of proceeding should the Board uphold or dismiss the respondent’s position regarding the appropriate bargaining unit.

17. In the Board’s view, it is more appropriate to first resolve the challenges to the schedule as that determination may well affect the hearing of the allegations of misconduct, notwithstanding that this order of proceeding may well delay that hearing somewhat. Thus, the Board hereby

appoints a Board Officer to inquire into and report back to the Board as to the list and composition of the bargaining unit as described in paragraph 15 above.

18. Accordingly, this matter is hereby referred to the Registrar.
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**2256-87-U; 2268-87-U MacMillan Bathurst Inc., Applicant v. Canadian Paperworkers' Union, Local 1497, Respondent; MacMillan Bathurst Inc., Applicant v. Canadian Paperworkers' Union, Local 1497 and Joao Amarelo and all hourly rated employees of the applicant who are not on layoff, Respondents**

**Reconsideration - Strike - Reconsideration of Board decision exercising discretion to decline to issue a strike declaration denied**

**BEFORE:** *Judith McCormack*, Vice-Chair.

**DECISION OF THE BOARD;** March 15, 1988

1. These matters are two applications under section 92 for declarations that employees engaged in and the union authorized an unlawful strike, and for associated remedies. On December 2, 1987, the Board issued a decision in which it exercised its discretion to decline to issue a declaration or the remedies requested.

2. Since that time, the applicant has requested that the Board reconsider its decision. The grounds cited for reconsideration are as follows:

- (1) the applicant alleges that the Board did not answer the question of whether the respondents engaged in an unlawful strike;
- (2) the applicant alleges that the Board based its decision on either the doctrine of estoppel or on the ability of the parties to contract out of the *Labour Relations Act*;
- (3) the applicant alleges that the Vice-Chair who heard this case conferred with other Vice-Chairs and/or the Chair and officially requests that the Board provide to the applicant information with respect to the nature and details of those meetings; and
- (4) the applicant requests a hearing so that argument may be made with respect to the consequences of this decision on the labour relations community in general.

3. Section 106(1) which sets out the Board's powers of reconsideration provides as follows:

106.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

4. In *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Feb. 185 the Board described its general approach to reconsideration applications:

To avoid abuse of the reconsideration provision and bring some finality to its adjudicated decisions the Board has adopted principles not unlike those of the courts. The Board will not normally accede to a request to reconsider unless the party requesting reconsideration intends to adduce new evidence which was not previously available to them by the exercise of due diligence, and then only where such additional evidence, if proved, would be likely to make a substantial difference to the outcome of the cases. Reconsideration is therefore generally restricted to allowing a party to adduce evidence or make representations which it did not have a previous opportunity to raise. The Board may also consider such factors as the motives for the requests for reconsideration in light of a party's conduct, and the resulting prejudice to another party if the case is reopened. (See, generally, *International Nickel Company of Canada*, 63 CLLC 16,284; *The Detroit River Construction Limited*, 63 CLLC ¶16,260; *National Steel Car Corporation Limited*, [1966] OLRB Rep. Apr. 55; *Canadian Union of General Employees*, [1975] OLRB Rep. Apr. 320; *York University*, [1976] OLRB Rep. Apr. 187 affirmed, sub. nom. *Jordan v. Ontario Labour Relations Board, York University Faculty Association, York University*, 78 CLLC ¶14,132, (Ont. Div. Ct.).

In *London Soap Company Limited*, [1987] OLRB Rep. Feb. 241, the Board added the following observations:

The Board's jurisdiction to reconsider a decision is a broad one. However, both the Act and the realities of labour relations dictate that the premise from which the Board begins is that its decision should be final and conclusive for all purposes. Practice Note No. 17 accurately sets out the circumstances under which the Board will reconsider a decision. In recognition of the need for finality, the Board will not usually reconsider a decision unless an obvious error has been made; or the request raises important issues of Board policy; or, it is satisfied that the party requesting it proposes to adduce new evidence that it could not, with the exercise of due diligence, have obtained previously, and that the new evidence, if adduced, would be virtually conclusive; or, if a party wishes to make representations or objections it had no previous opportunity to raise.

5. Turning to the applicant's first ground for reconsideration, it is often the case the parties will make a number of legal and factual arguments in any given matter. However, the Board is not required to decide all possible issues which are raised in a case, but only those necessary for a complete disposition of the matter. In this case, the applicant applied for a declaration and relief under section 92 of the Act which provides as follows:

92. Where, on the complaint of a trade union, council of trade unions, employer or employers' organization, the Board is satisfied that a trade union or council of trade unions called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union or council of trade unions counselled or procured or supported or encouraged an unlawful strike or threatened an unlawful strike or that employees engaged in or threatened to engage in an unlawful strike or any person has done or is threatening to do an act that the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike, the Board may so declare and it may direct what action, if any, a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.

The parties made a number of lengthy and interesting arguments at the hearing, including arguments directed at whether a refusal of employees to work overtime in concert fell within the definition of "strike" under the *Labour Relations Act*, and whether in any event the Board should exercise its discretion to grant the declaration and relief requested. For the reasons set out in its decision, the Board found that the appropriate exercise of its discretion in the circumstances of this case was to decline to issue a declaration and associated remedies. As a result, it made little sense for the Board to go on to make a determination on an issue which would only be relevant if the Board had decided such relief should issue. Moreover, it is not necessary in these circumstances for the Board to consider first whether an unlawful strike existed and only then consider the appropriate exercise of its discretion. While a finding of an unlawful strike is a necessary precondition



before a declaration or remedies can issue, it is superfluous in the circumstances before the Board. A two-step process would be highly artificial and impractical in these kinds of applications which are often a matter of great urgency, and it might well result in a proliferation of unnecessary determinations.

6. While there are times when the Board may go on to comment on issues which are not strictly necessary to the disposition of a case in the hope that its views may be of some assistance to the parties in ordering their affairs in the future, this is not a case where such an approach would have been advisable. Here, the finding that the applicant argues the Board should have made was that a concerted refusal by employees to work overtime was an unlawful strike. The declaration that the Board found it inappropriate to issue was virtually identical. Where the Board has determined that it will not issue a declaration, making the finding requested would allow the applicant to obtain by the back door what it could not get by the front.

7. The Board came to a similar conclusion in *Steinberg Inc.*, [1983] OLRB Rep. Feb. 253 where the applicant had applied under section 89 of the *Labour Relations Act* for a declaration and posting to the effect that the union had violated sections 74 and 76 of the Act. The Board approached the matter in a manner similar to an application under section 92 of the Act and made this finding in paragraph 24 of its original decision (*Steinberg Inc.*, [1982] OLRB Rep. Sept. 1366):

Having reviewed the evidence and the submissions of the parties, the Board concludes that even assuming, but without finding, that the actions of Mr. Floyd on May 5th constitute a technical breach of sections 74 and 76 of the Act, we do not in the circumstances of this case consider it appropriate to issue any remedy whatsoever.

8. The applicant then applied for reconsideration for a number of reasons, including the fact that the Board did not make a finding as to whether the respondent had authorized an illegal strike. The Board noted that such a finding would be essentially the same as the declaration it had declined to issue. In the following passage, the Board concluded that it would defeat the due exercise of its discretion if it were to make such a finding:

10. The situation before the Board is unique. The declaration of an unlawful strike or encouragement thereof sought by the employer by way of remedy is virtually the same as a finding of whether or not there has been a violation of the Act. In this case the finding is the remedy. The Board determined in the exercise of its discretion that in the circumstances it would not be appropriate to grant the remedy sought by employer. The Board then declined to make a finding of whether or not there had been a violation of the Act as that very finding was the remedy the Board, in the exercise of its discretion, had determined was inappropriate.

11. Counsel for the employer does not take issue with the Board's decision not to issue a declaration, recognizing that the Board's decision not to issue a declaration by way of remedy falls squarely within the exercise of its own discretion. Seeking through a different channel what it cannot get by way of remedy, however, the employer insists that the Board has a duty to make a finding of whether or not there has been a violation. When the very finding of a breach of the Act is, under a different name, the very remedy sought by the complaining party, the Board is satisfied that it would defeat the due exercise of its discretion if it were required to make that finding when it has already concluded that the complainant is not entitled to the remedy, i.e. the declaration. In the Board's opinion it would require a clear legislative directive for the Board to be required to nullify the due exercise of its discretion in the manner contended by the employer.

The same rationale applies in these circumstances.

9. The applicant has also requested that the Board reconsider its decision because it is alleged the decision was based on estoppel or on the ability of parties to contract out of the Act. Neither of these grounds formed the basis of the Board's decision. Rather, the Board asked itself

whether the issuance of a declaration or other remedies in the exercise of its discretion would be appropriate in the circumstances before it. These are delicate assessments in labour relations terms, and the Board took into account a number of facts in arriving at its determination. It may well be that some of those same facts would support a finding of estoppel; however, this was not an issue canvassed by the Board because it was not relevant to its decision. At the same time, it cannot be said that simply because certain facts may lend themselves to the application of estoppel, as a result those facts must necessarily be irrelevant to the Board's deliberations applying a different test.

10. Similarly, the Board made no finding on the question of whether the parties could contract out of the *Labour Relations Act* because it was unnecessary to do so. However, the Board did consider that by virtue of the remedies requested, the applicant was in essence asking the Board to require employees to work overtime when it had itself given up that prerogative in the collective bargaining process. Again, it cannot be said that this is an irrelevant fact for the Board to consider in assessing whether certain remedies should issue. To suggest that considering the parties' conduct in the context of discretionary remedies amounts to allowing the parties to contract out of the Act ignores obvious differences between the two situations, and in part begs the question of whether overtime refusals in concert are a strike. Discretion under section 92 is precisely that; an area of latitude accorded to the Board by statute in recognition of the complexity and variety of problems that come before it, the Board's sophistication in labour relations matters and the need for the Board to respond in a manner that is both sensitive and sound. The Board did note that an injudicious use of its discretion might have the practical effect of undermining the strike ban in the Act, but this is a different concern, and one which the Board balanced against a number of competing concerns in arriving at its decision.

11. Turning to the applicant's allegations with respect to discussions between the Vice-Chair who heard the case and others, it is obvious that this is a little more than a fishing expedition. The Vice-Chair who heard this case was the only person who made the decision in this matter and she relied exclusively on the evidence and submissions presented at the hearing in reaching her conclusions. This is not an appropriate ground for reconsideration.

12. Finally, it is not necessary to hold a hearing to receive submissions on the reconsideration request. Needless to say, the Board disagrees with the effect which the applicant argues the decision may have. However, both parties addressed the issues in this case over a period of four days of hearing in a comprehensive fashion. The applicant does not allege that there is new evidence or other matters which might suggest a hearing would be advisable. Rather, it appears that the applicant, in light of its lack of success, seeks to add to the arguments it made at the hearing. The Board anticipates that reconsideration requests will normally be handled by written submissions without a hearing. Practice Note #17 provides in part as follows:

...

2. A request for reconsideration should be submitted in writing, addressed to the Registrar of the Board, *along with all of the submissions in support thereof*....

[emphasis added]

13. There is nothing in this case which suggests that a hearing is necessary or that the arguments the applicant wishes to make at the hearing could not have been made by way of the procedures set out in the Board's Practice Note, that is, by written submissions. In other words, there is no reason to depart from the Board's normal practice to handle requests for reconsideration without a hearing.

14. In conclusion, none of the matters raised by the applicant constitute grounds for reconsideration in view of the principles set out in *K-Mart Canada, supra*, and *London Soap Company, supra*. For these reasons, the application for reconsideration is dismissed.

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**3055-87-R Labourers' International Union of North America, Local 527, Applicant v. New Look Restoration (Ottawa) Ltd., Respondent**

**Certification - Construction Industry - Respondent requesting that Board apply build-up principle - Circumstances of respondent having more employees in the Spring common in construction industry - Board declining to defer consideration of application until later date - Certificates issuing**

**BEFORE:** *N. B. Satterfield*, Vice-Chair, and Board Members *W. Gibson* and *H. Kobryn*.

**DECISION OF THE BOARD;** March 15, 1988

1. The name of the respondent is amended to read: "New Look Restoration (Ottawa) Ltd."
2. In this application for certification the applicant filed eight combination applications for membership and receipts. The combination applications for membership are signed by the employees and the receipts are countersigned and indicate that a payment of \$1.00 has been made within the six-month period immediately preceding the terminal date of the application. The money was collected by more than one person. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.
3. The respondent filed a reply, a list of employees containing 13 names on Schedule "A" and specimen signatures within the time fixed in accordance with the *Labour Relations Act* and the Board's Rules of Procedure.
4. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on September 30, 1983, the designated employee bargaining agency is The Labourers' International Union of North America and The Labourers' International Union of North America, Ontario Provincial District Council.
5. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,



on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

6. The Board further finds, pursuant to section 144(1) of the Act, that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

7. The reply contains a request, at paragraph 14, for a hearing into the application. The request is supported by the following statements:

1. The employees of the Respondent affected by this application are totally unrepresentative of the number of employees traditionally hired by the Respondent.

2. Historically by the months of April and May during the Respondent's operations the Respondent employs between 30 and 60 employees to perform work governed by the application. The Respondent believes that its present work force will increase in numbers by either doubling or tripling its present work force.

3. Given these facts the Respondent urges this Board to exercise its discretion to consider or to give account to the expected build-up in the number of employees who would fall in the bargaining unit after the application date should the Applicant presently be in an outright certification position. Under these circumstances the Respondent submits that the Board should apply the build-up principle in relation to this Application.

8. Subsection 102(14) of the Act, quoted below, gives the Board discretion respecting whether it is necessary to hold a hearing into an application for certification made under the construction industry provisions of the Act:

(14) The Board may, subject to the approval of the Lieutenant Governor in Council, make rules to expedite proceedings before the Board to which sections 117 to 136 apply, and such rules may provide that, for the purposes of determining the merits of an application for certification to which sections 117 to 119 apply, the Board shall make or cause to be made such examination of records and such other inquiries as it considers necessary, but the Board need not hold a hearing on such an application.

9. The Board's discretion, in the words of the reply, "...to consider or to give account to the expected build-up in the number of employees..." is found in subsection 119(2) of the Act which states:

(2) In determining whether a trade union to which subsection (1) applies has met the requirements of subsection 7(2), the Board need not have regard to any increase in the number of employees in the bargaining unit after the application was made.

10. It has been the Board's consistent practice in construction industry applications for certification, when dealing with issues respecting bargaining unit descriptions and the number of employees at work on the date of making of the application, to consider only those persons who are at work on that date. This is because of the generally short-term nature of the employment relationship in the industry. One of the factors which still frequently contributes to that kind of relationship is the seasonal nature of some segments of the industry. If the Board assumes everything which the respondent has stated in support of its request to be true, the circumstances repre-

sented by those statements are quite common in the construction industry. In the Board's view, these are not circumstances which warrant the Board deferring consideration of the application until April or May when the respondent expects to be employing a greater number of persons in the work affected by this application.

11. An expectation of a seasonal upswing in the respondent's employment levels is readily distinguishable from the factual circumstances before the Board in *J. G. Fitzpatrick Construction Ltd.*, [1972] OLRB Rep. May 485, one of the rare reported instances where the Board has applied the build-up principle in a construction certification. The facts, as assumed to be true, in the instant application are also to be distinguished from those in *Industrial Mine Installations Limited*, [1968] OLRB Rep. May 217, a case involving circumstances analogous to a build-up.

12. In *Kent County Contractors*, [1983] OLRB Rep. April 549, the Board decided to hear submissions on how it should exercise its discretion under subsection 119(2) in a situation analogous to build-up and on alleged facts bearing some general similarity to those herein. It is readily apparent from that decision, however, that there were other issues which required a hearing in any event. That is not the case here.

13. Finally, in *Colibri Construction Inc.*, [1986] OLRB Rep. May 594, reconsideration refused [1986] OLRB Rep. July 931, in an alleged fact situation more substantial than the one asserted herein, the Board declined to consider and give account to an alleged build-up. The Board's reasoning in *Colibri* is wholly applicable to the instant case and the Board herein adopts those reasons. Accordingly, having regard to the Board's discretion under subsections 119(2) and 102(14) of the *Labour Relations Act*, the Board will have no regard to any increase after the application date in the number of employees in the bargaining unit described above as at the date of application and the Board finds no need to hold a hearing into the application.

14. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on March 8, 1988, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

15. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in the bargaining unit and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 4 above in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

16. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the

industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

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**2976-87-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. P. J. Wallbank Manufacturing Co. Limited, Respondent v. Group of Employees, Objectors**

**Certification - Representation Vote - Union establishing sufficient support to warrant certification without recourse to a representation vote - Board examining policy reasons warranting the additional evidence of a representation vote - Board exercising discretion to not order vote - Certificate issuing**

**BEFORE:** *R. O. MacDowell*, Alternate Chair, and Board Members *W. A. Correll* and *D. A. Patterson*.

**APPEARANCES:** *T. Heller*, *Clare Meneghini* and *Olive Ryan* for the applicant; *A. A. Morscher*, *A. J. Wallbank* and *N. Hofstetter* for the respondent; *Glenn Jones* and *Tom Epplert* for the objectors.

**DECISION OF THE BOARD;** March 28, 1988

1. The name of the respondent is hereby amended to read: "P J. Wallbank Manufacturing Co. Limited".
2. This is an application for certification.
3. There is no dispute, and the Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and, further, that this application is timely.
4. Having regard to the representations of the parties, the Board further finds the following to be the unit of employees appropriate for collective bargaining:

All employees of the respondent in Blandford-Blenheim Township, save and except foremen, persons above the rank of foreman, professional engineers, engineering technicians, training co-ordinators, designers and draftsmen, office, clerical and sales staff, home workers, canteen staff, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and students employed in co-operative education programs.

For the purpose of clarity the Board notes the parties' agreement that Robert Kocher and Andy Stubbe are excluded from the above-described bargaining unit, while Olive Ryan, the "stores keeper" is included.

5. In support of this application for certification the union filed documentary evidence of membership on behalf of more than fifty-five per cent of the employees in the bargaining unit. That documentary evidence consists of combined applications for membership and attached receipts. The receipts record the payment of \$1.00 to the applicant in respect of membership fees.



Each card is signed by the subject employee and the receipts are countersigned by a witness to verify payment. The documentary evidence is correct in all respects, meets the form and timeliness requirements prescribed under sections 1(1)(l) and 103(2)(j) of the Act, and is supported by a properly filed Form 9 Declaration attesting to its regularity and sufficiency. There is no allegation of misconduct or misrepresentation in the manner in which these cards were solicited. Certainly there is nothing to call into question the "voluntariness" of the individual acts of signing. There was also before the Board certain other written statements of employee views (for and against the union) which were filed prior to the terminal date. Those statements, when read together, do not raise any real question about the employees' wishes with respect to union representation.

6. Having regard to the totality of the evidence before it, the Board finds that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on February 22, 1988, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

7. Counsel for the respondent and the objecting employees do not dispute that the union has established sufficient membership support to warrant certification without recourse to a representation vote. They point out, however, that under section 7(2) of the Act the Board retains a discretion to direct that a representation vote be taken, even where it is satisfied that more than fifty-five per cent of the employees in the bargaining unit are members of the union. They urge the Board to exercise that discretion and order a vote. In support of this proposed disposition of the case, counsel for the respondent and the objectors make the following submissions:

- 1) The "arithmetic" is not overwhelmingly in favour of certification. About 57% of the bargaining unit members support the union but there is a significant minority which does not.
- 2) After the application date but before the terminal date, three individuals believed by the respondent and the objectors to be trade union members voluntarily terminated their employment. *If* they signed union cards, and if such were cards were disregarded, (even though those individuals were clearly employees in the bargaining unit on the application date) the objectors and respondent speculate that the union's "clear majority" of more than fifty-five per cent would be diminished below the statutory threshold.
- 3) The then parent and predecessor of the present applicant union was certified in 1980 after a protracted certification proceeding before the Labour Relations Board. Thereafter there were equally protracted negotiations resulting in a settlement unacceptable to the union, and a termination or abandonment of bargaining rights a couple of years later. The employer does not welcome a possible repetition of that scenario and therefore urges the Board to direct the taking of a representation vote in order to seek positive confirmation that a majority of its employees really do wish to be represented by a trade union.
- 4) Finally, the employer speculates that some of its employees may have signed union membership cards or other documents indicating support simply to please their fellow employees rather than any real

commitment to the union. A representation vote would provide employees having second thoughts with a mechanism for expressing them.

We shall deal with each of these submissions in turn.

8. Under the *Labour Relations Act*, a trade union is certified when it is able to demonstrate that a majority of the employees want it to be their bargaining agent. That determination is often made after examining its documentary evidence of membership. That is the system prescribed by the Act (see also Rule 73). In this jurisdiction representation votes remain a residual mechanism resorted to only when the union is unable to establish a "clear majority" (i.e. more than fifty-five per cent), there is some reason to doubt the reliability of the membership evidence as an indicator of employee wishes, or there is some policy reason or special circumstance warranting the additional evidence of a representation vote. The statute is quite clear that where the union has established the requisite "clear majority", votes are to be the exception, not the rule.

9. As we have already noted, the union's right to "automatic certification" does not depend upon establishing a simple majority as it does in the federal jurisdiction. The union must demonstrate support among more than fifty-five per cent of the employees in the bargaining unit. The Legislature has taken into account the possibility of close cases, by prescribing a higher threshold of support for automatic certification. Against that background it would be totally inappropriate for the Board, through the exercise of discretion, to impose some higher arithmetic standard simply because the arithmetic was "close" and the union had demonstrated only a little more than the clear majority specified in section 7 of the Act. It would also inject a degree of uncertainty - and hence litigation and delay - if the Board were to readily depart from what have heretofore been clearly established "rules".

10. Certification depends upon counting the number of employees and measuring the degree of union support at particular points in time. The statute provides that the number of employees in the bargaining unit will be determined on the application date and the degree of union support will be measured on the "terminal date" which is usually a couple of weeks later. It would be easier, of course, if both the number of employees and the level of membership support were determined on the application date. That is the federal model. The result, though, would inhibit the ability of members to register with the Board a change of heart after the application has been filed.

11. No doubt the present system does not always achieve perfect decimal point democracy. But no system could ever do so. The level of employment will inevitably be somewhat fluid, as will the wishes of employees. We do not think that the departure of three employees after the application date, *whether or not they were union supporters*, should prompt us to exercise our discretion to order a representation vote any more than the solicitation of more membership cards after the terminal date would prompt us to extend it so that the pro-union wishes of these employees could be counted. To really follow through with counsel's submission would require the Board, in each case, to obtain a second list of employees as at the terminal date, and do a second set of calculations. Moreover, to exercise our discretion in the manner suggested by counsel would require us to reveal the fact that the employees were *in fact* union supporters, or that they were not. The conclusion urged upon us would only follow if the three individuals in question had signed membership cards. Yet the scheme of the Act is designed, insofar as possible, to protect the confidentiality of that employee choice (see section 111 of the Act). An employee who signs a membership card (or an anti-union petition for that matter) is entitled to the protection of the statute even if s/he subse-

quently leaves the job. We decline to exercise our discretion in the manner, or for the reasons, urged upon us by the employer and objectors.

12. We do not think that the fact that collective bargaining was unsuccessful some years ago is any reason, today, to exercise our discretion to direct a representation vote. We are well aware that collective bargaining alters the way in which an employer deals with its employees and may involve negotiating or contract administration costs which it would prefer to avoid. If collective bargaining ultimately founders, an employer may consider those costs unnecessary or "thrown away". However, we do not think that any useful purpose would be served by conducting a post mortem of the collective bargaining experience some years ago in order to address the employees' position today, or to speculate about the likelihood of success this time. We do observe, parenthetically, that the first round of bargaining had a rather inauspicious beginning since the certification proceeding took a year to complete, and was punctuated by the unfair labour practice discharge of the union's key employee supporter. It is hardly surprising that, in the circumstances, and over time, the employees' appetite for collective bargaining would diminish.

13. Finally, we find no merit in the employer's submission that some of its employees *might* have signed membership cards because they were urged to do so by friends or fellow workers. People join organizations (churches, clubs, political parties, etc.,) for all kinds of reasons, including "peer pressure", or a desire to "go along" with one's friends. However, the precise motive for signing a membership card is irrelevant, so long as the card was not obtained by threats, promises, undue influence, or material misrepresentation. Should the employees change their minds with respect to the value of trade union representation, they will have an opportunity to terminate bargaining rights ("decertification") in the manner prescribed by the Act.

14. In summary then, the union has demonstrated sufficient support to warrant certification without recourse to a representation vote, and, in our view, there is nothing in the circumstances of this case which would warrant the exercise of our discretion to direct that a vote be taken.

15. A certificate will therefore issue to the applicant in respect of the above-described bargaining unit.

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**2795-84-U United Steelworkers of America, Complainant v. Shaw-Almex Industries Limited, Respondent v. Group of Employees, Objectors**

**Collective Agreement - Reconsideration - Remedies - Strike - Unfair Labour Practice - Board dealing with whether return-to-work protocol contained in respondent's proposal for a collective agreement discriminatory - Board making interim order directing the respondent to return the striking employees to work pending the disposition of the matter**

**BEFORE:** *Harry Freedman*, Vice-Chair, and Board Members *R. J. Gallivan* and *J. Kennedy*.

**APPEARANCES:** *Brian Shell*, *Norm Carriere*, *Joe Miles* and *Dennis Stevenson* for the complainant; *Michael Gordon* and *Johnathon Shaw* for the respondent; no one appearing for the objectors.

**DECISION OF THE BOARD;** March 3, 1988



1. When the Board reconvened the hearing in this matter in Parry Sound on March 1, 1988, counsel for the complainant requested the Board make an interim order directing the respondent to return the striking employees to work pending the ultimate disposition of this matter. The Board is presently dealing with whether the return-to-work protocol contained in the respondent's complete proposal for a collective agreement dated January 9, 1987, discriminated between the respondent's striking employees and the employees hired by the respondent as strike replacements. While counsel for the complainant characterized the request as an order to be made pursuant to the Board's remedial authority under section 89 of the *Labour Relations Act*, he ultimately asserted that the request he was making was in the nature of reconsideration of the Board's order of December 22, 1986, as amended by the Board's decision of February 16, 1987.

2. Counsel for the complainant submitted that the circumstances facing the parties and the Board were extraordinary and therefore called for an extraordinary response by the Board at this time. The strike against the respondent has continued for almost five years, bargaining is not taking place, there have been numerous Board and judicial proceedings arising out of this labour dispute and this particular Board proceeding is not close to completion.

3. Counsel for the respondent, while agreeing that the Board had the jurisdiction to make an order of the type requested by the complainant based on the authority conferred upon the Board by section 106 of the Act, submitted that we should not do so. Counsel argued that the complete proposal for a collective agreement, exhibit #1, tabs (a) and (b) filed in these proceedings, was still outstanding. Counsel pointed out that no real bargaining had taken place with respect to the respondent's proposal. The complainant's only response in a bargaining context was a letter to the respondent indicating that its proposal was not acceptable to the complainant.

4. During the course of argument, the Board asked counsel whether the respondent was in a position to now implement the proposal it had made in January, 1987. Counsel responded that as a matter of principle, it could certainly do so, but argued that no order should be made since the Board would be taking over the bargaining for one of the parties to this collective bargaining dispute.

5. Counsel for the complainant strenuously argued that the respondent's January 9, 1987 proposal was unacceptable and discriminatory. Counsel ultimately conceded however, that if we were to make any interim order that differed from the respondent's proposal, the result in effect would be to prejudge the dispute that is now before us without first having heard all of the evidence and submissions of the parties with respect to the issue that is before us, that is, whether the return-to-work protocol was non-discriminatory as between the striking employees and those employees hired as strike replacements.

6. It seems clear to us that the respondent's proposal of January 9, 1987 presented to the complainant which is still outstanding and which the respondent could implement if agreed to by the complainant is, at the very least, some basis for the striking employees to begin, on a gradual basis, to return to work. We are constrained to point out that as an interim matter we would not vary any of the terms of the proposal because to do so would clearly suggest that we find some of those terms, at this stage of the proceedings, contrary to our order of December 22, 1986 as amended by our decision of February 16, 1987, before giving the parties the opportunity to complete the presentation of their respective cases on this issue.

7. During argument, counsel for the complainant was asked whether the complainant wanted the respondent's proposal implemented as an interim order or dismissal of the motion for reconsideration. We also indicated to the parties during argument that if the Board did order implementation of the respondent's proposal, that order was not to be taken as a determination or

any indication that the proposal did comply with the Board's earlier decisions in this matter. Rather, we emphasized that such an order would be an interim measure, providing some framework within which a gradual return to work of the striking employees could take place. Counsel for the complainant then asked the Board to direct the respondent to implement its proposal of January 9, 1987.

8. Counsel for the respondent urged us not to make any interim order since doing so would involve the Board in the parties' bargaining in an unprecedented fashion. Counsel contended that the parties have not engaged in any real bargaining since the Board's December 22, 1986 order was made, suggesting that it was up to the complainant to discuss and provide some counter proposal to the respondent in a bargaining context.

9. Counsel for the respondent specifically did not raise any procedural objections to the complainant's request.

10. At the hearing we orally ruled that we would vary our previous orders and direct implementation of the respondent's offer of January 9, 1987.

11. The collective bargaining dispute between these parties has now gone on for almost five years and the parties' energies have in large part been devoted to preparing for and engaging in litigation over their respective rights. While both the complainant and respondent are clearly entitled to resort to litigation to attempt to vindicate their positions and we do not criticize them for doing so, it seemed to us that the interim order, in the nature of a variation of our earlier order, based entirely on a proposal that the respondent had made and which was still outstanding and which the respondent could implement, was a step towards getting the striking employees back to work without in any way prejudicing either the complainant or respondent in their apparent desire to resolve their collective bargaining disputes through these legal proceedings before the Board.

12. The parties did agree at our hearing that the implementation of the respondent's proposal should be March 14, 1988. The respondent undertook that it would not hire any employees into the bargaining unit between the day of the hearing in Parry Sound and March 14, 1988.

13. The Board therefore directs:

- i) the respondent to implement and,
- ii) subject to paragraphs 14 and 15 below, the parties to abide by

the terms and conditions contained in the respondent's proposal for a complete collective agreement, including the return-to-work protocol, that is dated January 9, 1987 and which is found at tabs (a) and (b) of exhibit #1 to these proceedings, on and after March 14, 1988.

14. As neither the complainant nor respondent have agreed to being bound by the respondent's proposal, and are only so bound to that proposal by reason of this order, the complainant is hereby relieved of the requirement set out in paragraph 1 of Part II of the respondent's proposal to sign a letter of understanding. The condition, however, contained therein with respect to the interpretation of article 2.02 of Schedule "A" to part I of the respondent's proposal remains in effect.

15. The parties are free to amend any of the terms and conditions set out in the respondent's proposal of January 9, 1987 by agreeing to any such amendments in writing.

16. This interim order shall remain in force until the parties enter into a collective agreement or until the Board otherwise directs, whichever occurs first.

17. For reasons given at the hearing of March 1, 1988, the hearings scheduled for March 2nd and March 3rd, 1988 were adjourned at the request of the respondent and over the objections of the complainant.

18. The hearings in this matter will resume in Parry Sound during the week commencing May 16, 1988 and will continue in Toronto on all other hearing dates.

19. While the Board is not making any further directions at this time, we once again urge the parties to meet in collective bargaining, with the assistance of a mediator or other intermediary to attempt to reach a collective agreement. The Board recognizes that the parties' dispute over the propriety of the respondent's proposal continues to exist as does the determination of compensation. The parties are, of course, free to include those matters in any collective bargaining negotiations that may take place. If either party however is unwilling to negotiate over those two matters, they will continue to be before the Board in these proceedings.

## **1629-87-U Canadian Union of Public Employees, Complainant v. University of Toronto, Respondent**

**Interference in Trade Unions - Unfair Labour Practice - Staff association having access to respondent's internal mail system - Respondent prohibiting association from using mail system for distributing complainant's organizing material - Board finding interference with complainant's rights under the Act - Board rejecting respondent's defence that it was trying to avoid breach of the Act**

**BEFORE:** *Patricia Hughes*, Vice-Chair, and Board Members *J. A. Ronson* and *P. Grasso*.

**APPEARANCES:** *James Hayes*, *Richard Blair* and *David Askew* for the complainant; *J. C. Murray*, *Scott Thompson* and *A. C. Pathy* for the respondent.

**DECISION OF VICE-CHAIR PATRICIA HUGHES AND BOARD MEMBER P. GRASSO;** March 4, 1988

1. The University of Toronto Staff Association ("UTSA") has access to the internal mail service or system ("the service" or "the system") operated by the University of Toronto ("the University" or "U of T"). Until recently, its use of this service was unrestricted; however, earlier this year UTSA began to use the service to distribute union organizing materials on behalf of the Canadian Union of Public Employees ("CUPE") and in August, the University prohibited use of the service for this purpose. The complainant, CUPE, now comes to this Board alleging that the University has violated section 64 of the *Labour Relations Act* ("the Act"). The University responds that to permit CUPE, through UTSA, to use its internal mail service would constitute "other support" for a trade union within the meaning of sections 64 and 13 of the Act and it is therefore justified in imposing the sanction.

2. The very difficult issues central to this complaint were articulated clearly and concisely by both parties. In brief, we must decide whether a cessation by an employer of an existing practice constitutes interference with a trade union's rights or whether continuation of that practice constitutes management involvement with a trade union and, further, whether a trade union which does



not have an independent claim to benefit from the practice, may nevertheless successfully claim that a denial of the continuation of the practice to its supporters constitutes an interference with *its* rights. Put another way: has the University interfered with CUPE's rights by restricting UTSA's use of the internal mail service, thus violating section 64? And, if so, is U of T entitled to defend its conduct by explaining it engaged in that conduct to avoid breaching the Act, both on its own behalf (in relation to giving employer support under section 64) and on behalf of CUPE (in relation to the risk to its certification because of employer support under section 13)?

3. Sections 13 and 64 of the Act read as follows:

13. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of any ground of discrimination prohibited by the *Human Rights Code, 1981* or the *Canadian Charter of Rights and Freedoms*.

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

Sections 3 and 71 of the Act are also relevant:

3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.

71. Nothing in this Act authorizes any person to attempt at the place at which an employee works to persuade him during his working hours to become or refrain from becoming or continuing to be a member of a trade union.

4. There was substantial agreement on the facts underlying this dispute. At the outset of the hearing, counsel for the University gave the Board an Exhibit Book which was admitted on agreement of counsel for CUPE, as were a small number of individual exhibits during the course of the hearing. David Askew, President of UTSA, was called by CUPE as the only witness in the case. He described UTSA's relationship with U of T and the use of the internal mail service by UTSA; he also explained why UTSA needs to use the service in its organizing campaign on behalf of CUPE and what he believed would be the relationship between UTSA and CUPE, should CUPE be successfully certified. Counsel for the University, on the agreement of counsel for CUPE, advised the Board about the operation of the internal mail service. That evidence was accepted by counsel for CUPE which had, he indicated, no independent knowledge about how the system works.

5. The internal mail service is under the management of B. Schmidt; he is responsible for seven employees, two of whom work in the post office located at Simcoe Hall on the University campus ("the Simcoe Hall employees") and five of whom work at the central sorting location, 563 Spadina Avenue ("the Spadina Avenue employees"). The Spadina Avenue employees sort the mail and put it in the appropriate box or bag for further distribution to the various buildings connected with the University (they are also involved in sorting mail going through Canada Post). There are two deliveries to Simcoe Hall by the Spadina Avenue employees, one at 9:00 a.m. and one at 1:00 p.m. (the times of the dispatches to the various locations are set out in Exhibit 34 to these proceedings); the Simcoe Hall employees sort, bundle and distribute the mail to the offices in Simcoe Hall and the office staff sort the mail further and distribute it to the individual employees during working hours. Most departments or locations have only one dispatch; for example, a Spa-

dina Avenue employee makes one drop at Admissions, sometime in the morning, and picks up that department's mail to take back to Spadina Avenue; employees in Admissions sort the mail which has been left there and distribute it among the employees working in Admissions. UTSA is listed on the list of dispatches as receiving a direct dispatch during the afternoon. ("Direct" means that the mail is taken to and picked up from that location: this is the most common form of delivery and pick-up; "indirect" means that the mail directed to two locations is dropped at one location where the mail destined for the other location is pulled and delivered to that second location or the bag addressed to the second location is delivered to the first location and an employee of the second location then picks it up; in a few instances, employees of a department pick up the mail at Spadina Avenue, dropping off their own at the same time, as is the case with the Addiction Research Foundation.) Scarborough and Erindale Colleges pick up their own mail and sorting and delivery is done at their own facilities; delivery is during working hours. The 1987-88 budget for the operation of the facilities at Simcoe Hall and Spadina Avenue, including employees' salaries and benefits, equipment, supplies and maintenance is \$224,854; the cost of sorting and delivering by other employees is absorbed into their salaries as sorting and delivery constitute part of their regular duties.

6. While the system is not used exclusively by internal individuals and groups, use by "outsiders" or "strangers" is rare and only with the permission of the University. The University's general policy is found in a letter from P. Tai-Pow, Manager, Parking and Mail Services, to J.D. Kraemer, Chief Administrative Officer, Faculty of Medicine, in which it is made clear that bulk mailings by outside organizations using the Faculty of Medicine's duplicating centre will not be accepted by the mailroom. That specific example reflects the usual practice. Counsel for the University explained that the United Way and the Cancer Society have been granted access to the system without charge (see Exhibit 29 herein, a communication of The University of Toronto's United Way Campaign entitled "United Way Update"); the Canadian Opera Company and the Te Deum Concert Society have also been granted access, but were charged. An academic at another university wishing to do a survey of U of T's faculty might be allowed use of the system, but would not be provided with labels with the faculty's University addresses.

7. UTSA uses the system to distribute a regular newsletter, notices of events, surveys with respect to discussions about terms and conditions of employment and other material to members; it also has used the system to solicit memberships (for UTSA) from the non-members among its constituency. In doing large mailings, UTSA sorts by department and building, putting the mail in regular mail bags, in order to facilitate the sorting which occurs at the University's central mail room. As an individual employee, Mr. Askew testified that he receives his statement of pay, benefit statement, letters from the administration to all staff, bills from the faculty club, solicitations from the United Way, announcements of events, correspondence from career counsellor associations at other universities and, in general terms, a broad range of material.

8. It is clear that the internal mail system operated by the University is used by organizations and individuals connected with the University (and in a very limited way, by organizations and individuals outside the University) to distribute professional and personal correspondence. No censorship has been applied, although the University maintains that it might impose censorship to prevent certain kinds of material, such as "hate literature", from being distributed through the system. In fact, except for the restriction placed on UTSA with respect to CUPE's organizing materials (and subsequently on persons seeking to use the system to voice their opposition to the union), the University has never placed restrictions on the use of the system, including the type of material which may be distributed and the distribution of personal correspondence during working hours. Mr. Askew stated, without contradiction, that there had never been any direction from U of T with respect to the "proper" use of the system; for example, although he has received all kinds of



personal material during working hours, those communications have never borne the notation "to be read outside working hours" or similar wording; nor did we hear of any general direction by the University that such material could be opened only outside working hours.

9. Mr. Askew, a career counsellor at U of T, has been granted 50% leave time by the University to work for UTSA which has been "recognized" by U of T since 1971 as the representative of the support, administrative and technical staff at the University. UTSA meets with the University's administration to discuss the terms and conditions of employment of those employees; Mr. Askew uses the term "negotiate" but the accuracy of that term is belied by his agreement with counsel for the University that should there be no agreement between them, the University may impose terms and conditions (after UTSA has had an opportunity to transmit its own views to the Governing Council through the President of the University): a document entitled "Process Related to Discussions between UTSA and the University on Salary and Benefits - January, 1980; Revised April, 1984", entered as Exhibit 2 to these proceedings, supports the position that UTSA serves as a vehicle by which the University can reach that segment of the University community to *discuss*, rather than negotiate, changes in their working conditions. As indicated, Mr. Askew has been given leave time to work with UTSA; three other employees have also been given release time. The University deducts dues from the pay of UTSA's members and has given UTSA office space. On the other hand, it does not appear that the University has ever interfered with or attempted to influence UTSA's internal proceedings or policies. In one sense, UTSA is similar to many other campus organizations which function on a university's premises; in another sense, it has a particular kind of relationship with the University in that it represents its members in discussions on the terms and conditions of their employment. There was no evidence before us, nor was it argued, that UTSA originated out of any initiative of the University rather than out of the initiative of affected employees.

10. In January, 1985, UTSA's salary and benefits committee recommended establishing a more formal relationship with the University, one similar to that enjoyed by the University of Toronto Faculty Association ("UTFA") which has been voluntarily recognized by the University as the bargaining agent for the faculty. This proposal was ultimately rejected by the University in April, 1987. UTSA sought its members' views on the question of whether UTSA should seek certification through surveys sent out through the internal mail system; replies also travelled through that system, as did reports on the progress of the debate. In distributing these and all its communications, UTSA uses mailing labels: for its 1,800 members, it produces the labels on its own computer (these were previously prepared on the University's computer, for which UTSA would pay for the time); for UTSA's entire 3,700 person constituency (that is all administrative, technical and support staff, whether members of UTSA or not), the University provides the labels for which UTSA pays.

11. In April, 1987, at UTSA's annual general meeting, the executive received a mandate to launch a certification drive "in affiliation with CUPE", to use Mr. Askew's words. Approximately 3,000 persons in UTSA's 3,700 person constituency fall within the bargaining unit for which CUPE intends to seek certification. The application for membership which UTSA asks people to sign is clearly an application for membership in CUPE, however, and not in UTSA or in some combination of UTSA/CUPE. Over the next few months, organizing material was sent through the internal mail system. In a letter dated May 19, 1987, UTSA asked the University for "two sets of labels for all non-unionized administrative staff ... who are not members of UTSA". The University's response was clear; in a letter dated June 9, 1987, from Alexander C. Pathy, Vice-President - Business Affairs, to Mr. Askew, the University set out the position it has maintained until the day of this hearing:



You have requested that the University supply UTSA with mail labels for administrative staff for purposes of distribution of material from UTSA through the University's internal mail system.

The University has become aware that mailing labels provided by the University have been used by UTSA to distribute literature supporting the CUPE organizing campaign and that such literature has been distributed through the University's internal mail system. This was done without the consent of the University and labels provided to UTSA were not provided for this purpose.

As you may be aware, the *Labour Relations Act* of Ontario provides that no employer shall participate in or interfere with the information, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union.

In the opinion of the University, providing mailing labels to UTSA for the purpose of enabling UTSA to distribute union literature to employees by use of the internal mails may well be viewed as [a] violation of the provisions of the *Labour Relations Act* referred to above which prohibit employer participation in the selection of a trade union or the provision of financial or other support to a trade union.

The University is not prepared to engage in any conduct which might be viewed as a violation of the provisions of the *Labour Relations Act*. In addition, the University is concerned that employees who have the right to join *any trade union* of their choice, might perceive the provision of labels and the use of the internal mail service as support for a particular trade union. Other trade unions may be interested in organizing employees at the University and employees may be interested in associating with another trade union. The University believes that no unfair advantage should be given to a particular trade union. Similarly, the University has refused requests from employees who have asked for mailing labels to communicate their views to other employees. The University's position regarding unionization is one of neutrality.

Therefore, the University is prepared to provide labels to permit UTSA to have literature distributed by the internal mail system to members and non-members only on your specific undertaking that such labels will not be used to disseminate literature supporting the organizing efforts of CUPE or any other trade union. Upon such undertaking being given by you or by other authorized representatives of UTSA, labels will be provided when requested. If UTSA has in its possession mailing labels previously provided by the University, we respectfully request that such labels not be used for the purpose of dissemination through the University's internal mail system of literature supporting union organizing efforts.

12. UTSA did not respond directly to this requirement of an undertaking, but requested (by letter of June 11, 1987) "a list of all staff hired since April 30, 1987, arranged by department". Then, in a letter from Mr. Askew to Mr. Pathy dated June 22, 1987, it set out its position:

As you are aware, for the past seventeen years, the University of Toronto Staff Association has represented the interests of the support, administrative and technical staff at the University of Toronto. Perhaps the most important aspect of this representation is the annual negotiation of improvements to salaries and benefits. Throughout the life of the staff association, the University administration has provided us, at our expense, mailing labels to enable us to communicate with our constituents. It is our view that you would not be viewed by the Labour Board as participating in the formation of a trade union if you continued the practice of supplying UTSA with mailing labels. We are of the opinion that it is more likely that your action to discontinue this practice would be viewed by the Board as an attempt to make the formation of a union more difficult.

I therefore request that the University continue the well-established practice of supplying UTSA with mailing labels and that our outstanding requests be fulfilled.

In its response seven days later, the University reiterated its position set out in its June 9th letter and stated that that position also applied to UTSA's request for a list of staff hired since April 30, 1987. On July 7, 1987, UTSA requested labels in order to distribute its June/July Newsletter, "the

main feature” of which, it said, “is a report on the salary and benefits settlement for 1987-88”. That request was refused by letter of August 24, 1987, on the basis that UTSA had failed to give the undertaking requested and that “the June/July Newsletter contains an article supporting the certification drive by CUPE that would clearly contravene the undertaking if it had been given”. The letter asserted that UTSA had been using the system to distribute literature supporting CUPE’s membership drive, including membership cards and that as of August 31, the campus mail service would not pick up or distribute UTSA’s outgoing mail. Mr. Askew testified that as of that date, UTSA’s mail was not picked up, but that it continues to receive delivery of mail addressed to it.

13. Mr. Askew informed UTSA’s constituency of the University’s decision in a memorandum to “All Staff of U of T”; it was dated August 28, 1987, and was the last communication from UTSA distributed by UTSA itself through the internal mail system. This memorandum had on it the following logo printed in the left-hand corner



Along the northwest edge of the square inside the circle are the letters “C.U.P.E.” and along the southwest side are the letters “S.C.F.P.” At the bottom of the page, appears the circle portion of the logo and beside it, the words “University of Toronto Staff Association/Canadian Union of Public Employees”. The University’s position was made public (within the University community) in a general statement of September 1, 1987; that statement, in addition to repeating what had been expressed in the letters to UTSA, contained the following paragraph:

The University has also received requests from individual employees for mail labels and the use of the University’s internal mail system for the purpose of communicating to fellow staff members their opposition to CUPE’s organizing efforts. The University has denied these requests, as well as UTSA’s for this purpose. This response is consistent with the University’s obligation under the *Labour Relations Act* not to interfere with the decision of employees to join, or not to join, a trade union of their choice.

Counsel for CUPE acknowledges that a possible consequence of CUPE’s request is that persons opposed to the union might also be able to use the internal system to garner support without running the risk of having a petition dismissed solely for that reason; however, he pointed out that individuals have not received labels in the same manner as organizations, including UTSA, have and therefore provision of labels would be a departure from the existing practice.

14. A letter dated September 3, 1987, with the same contents as Exhibit 11 to these proceedings, was sent by the University to administrative staff. Mr. Askew then wrote an “open letter” to the University’s President, Dr. George Connell (dated September 4, 1987 and marked as Exhibit 13 herein) in which he stated that denial of access to the internal mail system “constitutes, in our view, at one and the same time an attempt to thwart the union drive and a restriction on the freedom of speech of a significant portion of the U of T community”. He pointed out that UTSA has “enjoyed unfettered access to the internal mail system” since its formation in 1970 and thus use of the system “is the only means by which UTSA can realistically hope to contact its more than

3,000 constituents [and that c]ontinued access to the internal mail system is necessary for the UTSA Board and Executive to carry out the mandate given by our membership at our Annual General Meeting on April 30, 1987, to conduct a union drive in affiliation with CUPE". He further stated that the internal system is used by CUPE 1230, UTFA and SAC (Students' Administrative Council)(these are all representative of various groups at U of T). Dr. Connell responded on September 9, 1987, repeating the University's position and elaborating on it in the following manner:

The University, to the best of my knowledge, has never allowed any trade union or group of employees to use the internal mails to assist in organizing support for or against a trade union. To accede to your request would, in my view, be to create an unfair advantage to one trade union in circumstances where there may be other trade unions which also are attempting to organize or where there may be employees who wish another trade union to represent them or who wish no trade union at all. The prohibition in the *Labour Relations Act*, which make [sic] it unlawful for an employer to provide financial or other support to a trade union, is designed to eliminate the very advantage being sought on behalf of CUPE.

I respectfully disagree that UTSA has had unfettered access to the University's internal mail system. While constraints on the use of the mails have not been published, it is clear that the University's conduct must be governed by the rules as established by provincial legislation. For example, the University would not tolerate the use of the internal mail system for the distribution of literature which encourages discrimination. I do not suggest that UTSA would ever use the mails for such a purpose, but use this example only to make the point that access to any University service must be governed by law.

There is no restriction by the University on UTSA's freedom of speech. Within the rules of the *Labour Relations Act*, UTSA can support the union of its choice and engage in a certification drive but the University by virtue of the same *Labour Relations Act* must not be involved by allowing its mail service to deliver that message.

15. UTSA attempted to circumvent the University's decision not to pick up and deliver its mail by asking other campus organizations to distribute materials for it. For example, the Women's Centre, when it circulated a survey to women on campus designed to help it establish its priorities, also distributed notice of information sessions on Bill 154, the pay equity legislation; the notice indicated that the sessions were sponsored by UTSA and contained the slogan "Stronger Together" in the left-hand corner and the words "University of Toronto Staff Association/Canadian Union of Public Employees" at the bottom. No one contested that this was organizing material and Mr. Askew admitted that it had been sent through the internal mail system after the University's August directive. Canadian Union of Educational Workers ("CUEW"), Local 2 and CUPE, Local 1230 (both of which hold bargaining rights for certain U of T employees) extended an invitation to UTSA's constituency to attend the "UTSA/CUPE Union Drive Rally & Social on Thursday, October 1"; the invitation exhibited the "Stronger Together" slogan and the words "University of Toronto Staff Association" with UTSA's address at the bottom of the page and had a return address of CUEW, Local 2. It was also agreed that this was distributed through the internal mail system after August 31, 1987. As a result of these distributions, a memorandum dated September 24, 1987, and addressed to "All Departments and Organizations Served by the Campus Mail Service", expressed the University's position that the mail system depends on "a high level of trust and co-operation" and that the distribution of CUPE and UTSA material through the system by other organizations "undermines the trust upon which the campus mail system [sic] is based and may necessitate the re-assessment of the pickup and distribution of campus mail if it continues"; a copy of the September 1st statement is attached to that memorandum. John H. Parker, Director, Labour Relations, for the University, also wrote to Joanne Martin, President, CUEW, Local 2, on September 29, 1987, advising that the distribution of Exhibit 27 was improper and requesting that "CUEW not engage in any more such mailings".

16. After the University restricted UTSA's access to the system, UTSA attempted to set up



its own distribution system, using volunteers to deliver material during lunch hours and coffee breaks. Mr. Askew emphasized that trying to reach 3,000 people, potential members of CUPE, in various locations, is a difficult task and that to do that on their own would involve a great deal of time. Thus, he said, UTSA members have spent a disproportionate amount of time distributing materials at the expense of actual organizing.

17. The correspondence and other material has been set out in some detail in order to establish the background to this dispute and because they articulate the two sides of the debate very clearly. We now address the specific issues before us.

18. Section 64 of the Act is concerned with ensuring that one of the underlying policies of the Act, that trade unions are the freely chosen representatives of employees, is realized. To that end, employers are prohibited from becoming involved in organizing campaigns. So important is that policy, and the policy that trade unions and employers exist in an arms length relationship, that a trade union which has experienced employer support or participation shall not be certified by the Board, pursuant to the section 13 of the Act, the language of which has been termed "clear cut": *Drywall by Jamieson*, [1965] OLRB Rep. May 99. The importance of section 13 and its inter-relationship with section 64 was dealt by the Board in *Coons Heating & Sheet Metal Limited* [1978] OLRB Rep. June 525. There the employer found, after he had successfully bid on a job as sub-contractor, that the job could be sub-contracted only to a unionized company; he contacted two unions and subsequently encouraged one of his employees to contact the unions; that employee and others joined both unions. On a request for reconsideration of the first union's certification (by the employee), the Board rejected the union's submission that employer involvement in the section of a trade constituted only a contravention of section 64 of the Act and held, instead, that the "action of an employer in assisting a trade union to organize its employees amounts ... to the contribution of support of the trade union and as such comes within the category of 'other support' referred to in section [13]". The Board also made it clear that it had been prepared to reconsider its decision to certify the applicant even though the employee had known at the time of the certification of the facts upon which he relied in his request, because of the "strict prohibition contained in section [13] of the Act against certifying trade unions which have received employer support".

19. The University took the action it did in restricting UTSA's access to the internal mail service because UTSA was using it to distribute organizing materials for CUPE. It was the University's stated purpose to stop the distribution of CUPE's organizational material. It does not argue that the prevention of the circulation of CUPE's organizing material is an incidental result of its pursuing a "credible business purpose". The University does not claim that it is too costly for it to continue its normal practice with respect to the service. It was not argued that the cost is any greater or significantly greater because UTSA is distributing organizing material than it is when UTSA is distributing any other material to its constituency. The University has absorbed the cost of distributing personal communications, of material sent by unions with existing bargaining rights and by organizations such as UTFA, which is not a trade union, but has a bargaining relationship with U of T, or UTSA, which has had a "discussion" status relationship with the University administration. Rather, it claims (and has done so since the beginning) that it had to do what it did in order to avoid violating section 64's prohibition on contributing financial or other support to CUPE and to avoid (presumably on CUPE's behalf) satisfying the preconditions of non-certification in section 13 of the Act; in other words, the University has come forward with what it claims is "credible legal purpose" to justify its conduct. The dilemma which U of T contends it faces is articulated by the Canada Labour Relations Board in *Canadian Imperial Bank of Commerce*, [1985] 10 CLRB (NS) 182 (which involved the use of the Canadian Imperial Bank of Commerce's ("the Bank's") internal mail service by the Union of Bank Employees ("UBE")) as follows:

Unfortunately, the role of neutrality in which an employer finds itself was very much put in jeopardy by, in the instant case, the UBE's mailings. The mail could not be distributed to the employees without causing the employer to become intimately involved, whether it wished to or not, in the UBE's organizing campaign. The actions of the UBE put the Bank very much in a quandary. If it did not deliver the mail, it ran the risk of a complaint of the type eventually filed by the UBE [that it had interfered with the union's rights under section 184(1)(a) of the Code which contains similar, but not identical, wording to the first part of section 64 of the Ontario *Labour Relations Act*]. If it delivered the mail, it ran the risk of a complaint being filed that it was not staying neutral, that it was involved in the UBE's organizing campaign.

(In addition, the University relies on a secondary justification - that the mail is delivered and read during working hours - which we consider below.)

20. The University chose to solve its perceived dilemma by taking action to restrict UTSA'S use of the internal mail system. It could have simply declined to take any action and let matters run their already established course. Its justification for taking action is that it believes permitting the established practice to continue is a contravention of section 64, while imposing a change on the established practice is not a contravention. In our view, the opposite is the case. By letting matters continue, the University would not be indicating its support for CUPE; it would simply be treating UTSA as it treated all other organizations on campus and distribution by the University of other organizations' material is not considered support for that material. It may be true that the University has not only the right, but the obligation, to prevent the circulation of illegal matter through its internal mail service, should circulation of such material come to its attention. But organizing material is not in itself illegal. On the contrary, a union has a statutory right to distribute campaign material, although certain restrictions may be placed on that distribution (a qualification we consider below). As the Canada Board in *CIBC*, *supra*, stated:

one must distinguish between the Bank's right to prohibit solicitation by organizations such as the United Appeal or Canada's Wonderland from the right of the Bank to prohibit solicitation by a trade union. The former is completely within the purview of the Bank to allow or not. The latter is not.

Similarly, the Ontario Labour Relations Board, in *T. Eaton Co. Ltd.*, [1985] OLRB Rep. June 941 (application for judicial review dismissed; *Cadillac Fairview Corporation Limited et al v. Retail, Wholesale and Department Store Union et al*, 88 CLLC ¶14,005 (Div. Ct.)), pointed out in relation to a broad non-solicitation rule applied to the use of the Eaton's Centre by Cadillac-Fairview, Eaton's landlord, that "[t]he problem is, as with the case of employers, that a broad solicitation policy does not stand on the same legal footing vis-a-vis activities which are specifically protected by statute, and those which are not". In our view, by taking action to prevent the circulation of organizing material, the University has interfered with CUPE's organizing campaign and has violated section 64 of the Act.

21. The basis of the complaint is an interference in CUPE's rights resulting from an existing relationship between U of T and UTSA. Counsel for CUPE points out that while the complaint is brought on behalf of Mr. Askew and UTSA as specifically named grievors, CUPE's own rights have been affected; those rights, he asserts, are not derivative rights but distinct rights as an organizing union not to have those people it is organizing discriminated against; in practical terms, it seeks to enable its supporters to communicate with one another in the way they did before the organizing campaign. Counsel for CUPE agrees that CUPE is not claiming (for the purposes of this case, at least) that it has a distinct "right" to use the internal mail system, independent of any entitlement of UTSA to continued use of the system. CUPE has not attempted to use the system directly, by making application as an "outsider" or "stranger", but rather bases its claim on its informal relationship with UTSA which represents CUPE's potential supporters. Counsel for the University contends, on the other hand, that CUPE cannot rely on the history of the use of the



internal mail system which is at root of this complaint. He says that he does not object to CUPE's standing to bring the complaint, but, rather, submits that CUPE cannot be successful because it cannot claim any right to use the system: it cannot base a claim on the historical relationship to which it has not itself been a party. Although CUPE's complaint must be founded on its relationship with UTSA, CUPE is an entity quite distinct from UTSA. Whatever CUPE may claim with respect to the use of the internal mail service, it cannot claim it on the basis that it is some form of extension of UTSA or that it is UTSA in another guise nor does it made any such claim.

22. One of the rights enjoyed by CUPE, or any other trade union, under the Act is freedom from interference by the employer in the manner in which it is formed or administered or in which its supporters select it. In short, CUPE is entitled to expect that the employer will take a "hands off" attitude during the organizing campaign, as well as after certification (although section 64 also ensures that the employer may express his or her views "so long as he [or she] does not use coercion, intimidation, threats, promises or undue influence"). UTSA is the main force behind CUPE's organizing drive; its identification with CUPE, in that capacity, is well-known and has been made clear in the information distributed by UTSA to the administrative staff. Thus when U of T restricts the manner in which UTSA communicates with its supporters, it knows that it is restricting the manner in which CUPE communicates with its supporters. CUPE's claim arises out of its specific relationship with UTSA and UTSA's role as CUPE's major source of support. CUPE's claim arises out of its statutory rights as a trade union engaged in organizing U of T's employees. Indeed it is worth noting in connection with CUPE's place in these proceedings, that the University has no difficulty in justifying *its* conduct with respect to UTSA in terms of the effects on CUPE, even while it argues that CUPE cannot successfully respond to the effects it believes that conduct has on its organizing drive.

23. It is crucial to our conclusion in this matter that UTSA was continuing to do what it had always done: use the internal mail system to distribute materials of concern to it and its members or its broader constituency. Thus the context is not the same as in the *CIBC* case, *supra*, in which the UBE began to use the internal mail system at the time of its certification campaign. UTSA enjoyed a "benefit" all organizations, and in slightly different form, all individuals, who are part of the University of Toronto community enjoy. The University, in allowing UTSA to use the system, was doing nothing in or on its behalf that it does not do for all other campus organizations. Although UTSA specifically requested labels for the purpose of distributing the material, that request was consistent with its usual manner of distributing materials to its constituency. It made no special request to involve the University in the campaign. It is the fact that the system is a pre-existing practice and that UTSA's use of it has not involved the University in a deliberate way in the campaign which distinguishes this case from most of the cases cited to us by counsel for the University illustrating situations in which this Board has found employer involvement constituted a violation under section 64 or has declined to certify a union under section 13 of the Act.

24. In *Microdent Laboratories Ltd.*, [1969] OLRB Rep. Oct. 852, the company's President, at the request of the union's organizer, attended the meeting at which the organizer spoke to the employees; the Board concluded that his "apparent support would influence the employees in favour of the union" and refused to certify the trade union under section 13 of the Act. The Board has also refused to certify a union where it has used company premises for its founding meeting with the permission of the employer free of charge (*Gillies Bros. & Co. Limited*, [1964] OLRB Rep. Dec. 420; *Kemp Products Limited*, [1966] OLRB Rep. April 39; *Kenora District Home for the Aged*, [1960] OLRB Rep. April 28; *Crowe Foundry Limited*, [1969] OLRB Rep. May 218; *Burlington-Nelson Hospital*, (1963) CCH Canadian Limited ¶16,629); where the employer attended at the meeting and gave advice (*Gillies Bros.*, *supra*); where the union's constitution had been the subject of negotiations between the employer and the applicant association (*Kemp*



*Products, supra*); where the employer had given permission to the employee association to post notices announcing a meeting of the association for the purpose of passing a constitution and appoint officers and a bargaining committee (*Gillies Bros., supra*; also see *Crowe Foundry, supra*, for similar facts); where a member of management posted a notice of the organizational meeting bearing his name (*Kenora District Home for the Aged, supra*) or the meeting was announced over the company's public address system (*Burlington-Nelson Hospital, supra*; *Alco Compunders Inc., [1979] OLRB Rep. Sept. 845* in which management shut down production so that the employees could attend a meeting in the company cafeteria); and where the employer had voluntarily checked off the dues with which the association was financed (*Crowe Foundry, supra*; *Canadian Home Products Limited (Niagara Falls), [1961] OLRB Rep. Aug. 158*; *Scott Haulage Limited, [1963] OLRB Rep. Jan. 422* in which the employees were represented by another bargaining agent). In *Drywall by Jamieson, supra*, not only was the employer deducting dues before certification and a collective agreement, but was paying the dues of two members of the applicant, although the applicant may not have been aware of the latter. In a more recent case, *Fautless-Doerner Manufacturing Inc., [1980] OLRB Rep. Feb. 214*, the employer referred the applicant association to a consultant who advised the association; in addition, management was involved in the process by which the association tried to change its status to that of a trade union and meetings were held on company premises: the Board found that the association was not a trade union and that, in any case, it would be prohibited from certifying it. In *Square D Canada Electrical Equipment Inc., [1980] OLRB Rep. Sept. 1324*, the plant manager of the respondent read to the employees a statement which the Board found to be "a very carefully worded and guarded statement", but which nevertheless revealed the preference of the employer for a "shop association" rather than the applicant trade union; following the statement, the employer permitted an employee to circulate a petition for an association during working hours. The Board concluded that "[s]uch an open condonation of [the employee's] behaviour becomes a clear indication [to the employees] that [he] ... is acting on behalf of their employer. Further, no attempt is made by the employer to dispel this impression".

25. The context of these cases is significantly different than that before us. In all these cases, the employer and the union or employees' association are clearly not in arms length relationships; in many of the cases, the union actively sought the support of the employer specifically for the purpose of the organizing campaign. For example, in *Coons Heating, supra*, the Board felt compelled to add that neither of the unions involved "can escape censure for their actions" in actively seeking representation of the employees through the employer. The Board in *Microdent Laboratories, supra*, applied a distinction set out in *Canadian Fabricated Products Limited, C.C.H. Transfer Binder 1949-54, ¶17,090* between "an organization which is the passive recipient of unsolicited favours and an organization whose officers or officials actively avail themselves of favouritism by an employer or an employer's representative as an aid in the recruitment of members". While we do not necessarily adopt that as a general principle, we find it is particularly apropos in this case, where CUPE is simply seeking to maintain a practice which its major supporter has enjoyed since its inception and has enjoyed, not because it represents employees of the University in discussions with the University, but simply because it is a campus organization. For that reason, we do not find these cases helpful except to the extent that they reflect the underlying purpose of sections 64 and 13, that a union and employer of the employees it represents or seeks to represent should be in an arm's length relationship and that the union is not formed in conjunction with the employer's interests or wishes. We have no doubt that this requirement is met by the parties in this case.

26. The University relies on the *CIBC* case, *supra*, however, where the UBE did not actively seek the Bank's support in the manner referred to above. Furthermore, in the *CIBC* case, *supra*, the issue was union solicitation during working hours and the University contends that it is

justified in restricting UTSA's access to the internal mail system because the result of UTSA's using the service is that employees receive the mail during their working hours; thus, in effect, solicitation by the union is occurring during working hours and therefore the University is entitled to control it.

27. In the *CIBC* case, *supra*, both the UBE and the Bank engaged in various conduct which was alleged by the other to constitute a violation of the *Canada Labour Code*. Of relevance here is the use of UBE of the Bank's internal mail system to distribute organizing materials; the Bank alleged that this was a contravention of the Code, section 185(d) of which states

185. No trade union and no person acting on behalf of a trade union shall

...

(d) except with the consent of the employer of an employee, attempt, at an employee's place of employment during the working hours of the employee, to persuade the employee to become, to refrain from becoming or to cease to be a member of a trade union; ...

(It is significant that no such prohibition exists under the Ontario legislation.) The purpose of section 185(d) is to avoid disruption of the employer's workplace; thus a union may solicit in the workplace, but not during working hours. The Board characterized the section as a "limitation on the scope of activity permitted to a trade union or a person acting on its behalf during an organizing campaign" and compared it with the "basic freedom enjoyed by employees" codified by section 110(1) of the Code: "Every employee is free to join the trade union of his choice and to participate in its lawful activities"; an overly broad non-solicitation rule may run afoul of that right. (Section 110(1) of the Code is similar to section 3 of the Ontario *Labour Relations Act*.) The UBE used both external and internal mail systems, mailing a series of communications to individual employees, the later ones of which contained the words "Read on your own time" on the envelope (the failure to include that caution on the first mailings was a significant factor in the Board's decision). Mail delivered to the Bank by Canada Post addressed to individual employees would normally be delivered to those employees by the Bank. In this instance, after delivering the first batch of mail to the employees, the Bank kept back the letters and informed the employees there was mail for them to pick up after they had finished work. The Bank followed a similar procedure with the letters sent through the Bank's internal mail system: it did not restrict actual use of the system. With respect to the use of the external mail system, the Board took the view that "[t]he attempt to persuade cannot be said to be limited to the reading of the actual documentary material that eventually finds its way into the hands of employees. It is all the actions of the union which are designed to bring to the attention of the employees the fact that the union was organizing and soliciting members. If these attempts take place during the working hours of employees, then there will be a violation of section 185(d)". The attempt to persuade "started the moment employees were made aware by the Bank during their working hours that the UBE had addressed envelopes to them at work". The Board found that "the use of the internal mailing system of the Bank cannot be said to be other than an attempt to persuade during working hours and constitutes a clear violation of section 185(d) by the UBE".

28. The UBE had also made "drops" of envelopes on employees' desks or chairs; although the drops were made prior to the commencement of regular working hours, there was "some question" about when the material was actually read; nevertheless, the Board did not find a violation of section 185(d) of the Code but did find that the Bank had violated section 184(1)(a) of the Code (the equivalent section to section 64 of the Ontario *Labour Relations Act*) by picking up the material before it could be found by the employees and by posting notices that the UBE's activity was subject to discipline. The Board indicated that the important point is that the drops were made



before working hours and that the Bank could have stopped the employees' opening the material once the working hours had started and therefore could have stopped any disruption, should there have been any. It analogized this kind of solicitation to standing and handing out material outside the place of work: "in both cases the solicitation is done outside working hours. In both cases, the Bank can exercise its managerial authority during working hours to ensure that employees are working rather than discussing the union or the literature it distributed during non-working hours". The Board found that there was no intention "manifested by the manner in which the drops were made" that the material be read during working hours since the word "Personal" appeared on the face of the envelope (we note that that word also appeared on the external mailings and on the internal mailings that were individually addressed).

29. We have already noted that the UBE first began to use the mail system at the time of its organizing campaign. The second point to note about the applicability of the *CIBC* case, *supra*, is that the case really concerns solicitation by the union during working hours which constitutes a breach of a specific provision of the Canada Code; it seems clear from the Canada Board's consideration of the union's making "drops" of material that had the union ensured that the use of the internal mail did not involve solicitation during working hours, it might not have found a violation of the Code. In other words, the Canada Board's concern was not the use of the internal mail system in itself, but rather that the manner in which it was used resulted in solicitation during working hours. Here the University has never had any difficulty with personal material distributed and received during working hours being read during working hours; its concern about that practice has been raised only in conjunction with the distribution of CUPE's organizing materials.

30. The Ontario *Labour Relations Act* does not contain a prohibition against the union's soliciting during working hours; rather, section 71 of the Act simply indicates that the Act does not authorize solicitation in the workplace during working hours. The purpose of section 71 has been explained by the Board in *The Adams Mine, Cliffs of Canada Ltd., Manager*, [1982] OLRB Rep. Dec. 1767 (in which the majority dismissed the complaint under section 64 because the material distributed by the union was political and therefore not protected under the Act),

as afford[ing] an employer an answer to the charge that he has interfered with a person's rights under section 3 of the Act by preventing that person from attempting to solicit an employee during working hours. The section recognizes the employer's bona fide interest in maintaining an efficient business enterprise and the fundamental obligation of employees to work in return for compensation. But section 71 does not speak to activities outside of an employee's working hours while on his employer's premises.

There is not an absolute ban on soliciting during working hours. Jurisprudence under the Ontario legislation has developed a distinction between what is permissible and impermissible solicitation during working or non-working hours, as summarized in *The Adams Mine* case, *supra*, at paragraph 22:

(a) No-solicitation or no-distribution rules which prohibit union solicitation on company property by employees during their non-working time are presumptively an unreasonable impediment to self-organization and are therefore invalid; however, such rules may be validated by evidence that special circumstances make the rule necessary in order to maintain production or discipline.

(b) No-solicitation or no-distribution rules which prohibit union solicitation by employees during working time are presumptively valid as to their promulgation, *in the absence of evidence that the rule was adopted for a discriminatory purpose or applied unfairly*; and no-solicitation or no-distribution rules which prohibit union solicitation by non-employee union organizers at any



time on the employer's property are valid in the absence of an application or a direction pursuant to section 11 [of the Act].

[emphasis added]

31. The operation of the non-solicitation during working hours rule was explored in *Eaton's, supra*. None of the entrances to Eaton's at the Eaton's Centre abutted public property, but rather opened onto the Eaton's Centre mall which is controlled and managed by Cadillac Fairview. Union supporters therefore distributed material in the store during breaks and after work, but the union subsequently received a letter from Eaton's objecting to such distribution because of the disruption to work interfering with customers and creating a housekeeping problem and informing the union that it was denying union representatives access to the store and attendance at the store by representatives would be considered a violation of the *Trespass to Property Act*. Accordingly, the union distributed notices of a meeting outside the store doors to employees going into work. Security personnel from Cadillac Fairview informed the organizers that they were on Cadillac Fairview property and soliciting and distributing leaflets were prohibited. The union organizers subsequently engaged in various activities around the Eaton's doors, inside the store in the fast food area and in the mall area. Cadillac Fairview had a broad "non-discriminatory" non-solicitation policy; Eaton's itself had a restrictive solicitation policy: oral solicitation on the employer's premises in non-working hours was permitted; the distribution of literature was controlled, Eaton's taking the view that it can ban a distribution on its premises anywhere and anytime, but an employee could hand another employee a card or exchange literature at coffee; union issues could be discussed in the restaurants as long as such discussion is not the purpose for gathering in the restaurant. The union claimed it required access to employees in the store area because it had no other effective means of communication with the employees reasonably available to it, a factor the Board weighed in reaching its decision, along with the disruption to Eaton's business. The Board found that Cadillac Fairview and Eaton's were not strangers to one another and that in restricting access, Cadillac Fairview was satisfying the wishes of its client, Eaton's. The Board said it had not forgotten that Cadillac Fairview asserted that it imposed a "broad, non-discriminatory solicitation policy" in order to control activities in the mall, but that Cadillac Fairview could provide no business purpose of its own which justified prohibiting organizers from standing at a specific place outside Eaton's door in a public area of the Eaton's Centre before opening hours in order to hand out literature to or engage in conversation of section 64 of the Act. Eaton's restriction of the use of restaurant facilities to union business only as an incident to normal use of the restaurants was acceptable. The Board ruled that mass distribution could occur in the store before opening hours, but only on a limited basis to accommodate Eaton's legitimate business concerns; in reaching this conclusion, it considered the other means of communication available to the union. It held that a "blanket" no-distribution rule in relation to the store, applying when the store is not open to the public and the employees are not working, is a contravention of section 64.

32. The University has permitted the distribution of all manner of communications through its internal mail system and has imposed no ban on the reading of such material during the employees' working hours. There is no indication that the receipt of organizing material during working hours has led to any disruption of the workplace. While the University has not allowed persons in opposition to the union to use the service to communicate their views or to organize, it cannot be ignored that the University took that action after it had restricted UTSA's use of the system. Furthermore, it appears that those persons would not have the same kind of access UTSA has, at least in the sense that they do not, as individuals, obtain labels from the University. Accordingly, we are not satisfied that the refusal of access to those persons is evidence of a non-discriminatory ban on the use of the system. The restriction of UTSA's use is discriminatory, however. Accordingly, it is not open to the University to base its decision to prevent circulation of organizing materials on its

authority to control the use of work-time, because such conduct clearly constitutes a change in its normal practice.

33. Change in the employer's policy in response to an organizing campaign was considered by the Canada Board in *American Airlines Incorporated*, [1981] 3 Can. L.R.B.R. 90 in which the union alleged that the employer's refusal to allow union material to be placed in employees' mail boxes constituted a violation of the *Canada Labour Code*. Because of the nature of the employer's business, it had set up mail boxes or pigeonholes in order to communicate with employees; in addition to the material placed there by the employer, a variety of other correspondence was put in the boxes, including blood donor appeals, personal notes, invitations, personal telephone messages, advertising for car rentals and political literature. The material left there was much the same as that distributed through U of T's internal mail system, except that it included advertising. Each employee was required to empty his or her pigeonhole before the start of his or her shift (we have already dealt with that distinction between *American Airlines*, *supra*, and this case). Employees at American Airlines had put union material in the mailboxes before the start of their shift or on their off time; the employer considered this an infraction of a company regulation which prohibited the use of company facilities "for purposes not directly related to Company business". (U of T. does not claim that any such restriction was ever intended with respect to the use of its service.) The Canada Board found that, although the regulation had been in place "for a number of years", it had not been enforced since the mail boxes, company facilities, had been used for personal messages with the knowledge of the employer. Furthermore, there was no evidence of disruption in the workplace as a result of this use of the mailboxes and no reason to believe union literature would cause any greater disruption than other forms of literature. The Board concluded that "the employer's interdiction to forbid the distribution of union literature in the mail boxes is inconsistent with the administration of its policy regarding the distribution of literature and is thus discriminatory".

34. In summary, we find that the restriction by U of T of UTSA's enjoyment of an *existing* practice constitutes an interference with the rights of CUPE under section 64 of the Act. While a "stranger" to the U of T community may not be able to demand access to the internal mail system on its own behalf, CUPE may enforce its right under section 64 based on UTSA's use of the service since UTSA represents CUPE's supporters and CUPE's claim is based on its supporters' right to be treated as they were before its organizing campaign.

35. Accordingly, we hereby

(a) declare that the University has violated section 64 of the *Labour Relations Act*; and

(b) direct the University to permit UTSA access to the internal mail service in the manner previously enjoyed.

36. CUPE seeks a posting in every department of the University and a mailing to all administrative staff. No submissions were directed towards why we should grant these remedies. In the circumstances of this case, we are not satisfied that a posting and mailing would be appropriate.

37. CUPE requested a declaration that the "six month" rule not be applied to its membership evidence, but made no further submissions on this matter; nor did the University address it. We are of the view that that question is more properly a matter for the panel hearing the application for certification: the "six month" rule generally applies to the Board's discretion to direct a vote and we cannot bind another panel of this Board in the manner in which it should exercise its discretion. We therefore decline to comment further on this matter.

# DECISION OF BOARD MEMBER JAMES A. RONSON;

1. This is a case in which my colleagues depart from the long-tested and long-applied "rules" of the Board concerning employer interference with the formation of a trade union. It is a case that advances the premise that, in certain situations, an employer is obligated to provide support to employees who may support or who may oppose the formation of a trade union. I cannot agree with that premise, for to do so is to stand each of the following cases of the Board on its head:

*Kenora District Home for the Aged*, [1960] OLRB Rep. Apr. 28;

*Queen Elizabeth Hospital (Toronto)*, [1961] OLRB Rep. May 39;

*Canadian Home Products Limited*, [1961] OLRB Rep. Aug. 158;

*Burlington Nelson Hospital, et al*, [1962] OLRB Rep. Nov. 285;

*Scott Haulage Limited*, [1963] OLRB Rep. Jan. 422;

*Gillies Bros. & Co. Limited*, [1964] OLRB Rep. Dec. 420;

*Drywall by Jamieson*, [1965] OLRB Rep. May 99;

*Kemp Products Limited*, [1966] OLRB Rep. Apr. 39;

*Crowe Foundry Limited*, [1969] OLRB Rep. May 218;

*Microdent Laboratories Ltd.*, [1969] OLRB Rep. Oct. 852;

*Coons Heating & Sheet Metal Limited*, [1978] OLRB Rep. June 526;

*Aclo Compounders Inc.*, [1979] OLRB Rep. Sept. 845;

*Fautless-Doerner Manufacturing Inc.*, [1980] OLRB Rep. Feb. 214;

*Square D Canada Electrical Equipment Inc.*, [1980] OLRB Rep. Sept. 1324;

*Tri-Canada Inc.*, [1981] OLRB Rep. Oct. 1509;

*The Adams Mine, Cliffs of Canada Ltd., Manager*, [1982] OLRB Rep. Dec. 1767.

2. The evidence discloses the following:

- (a) the internal mail service is the property of the University, the use of which is a privilege granted by the University;
- (b) no individual has been given the privilege of using the internal mail system;
- (c) the UTSA cannot claim the protection of section 64 of the *Labour Relations Act*;
- (d) the effect of the decision of the University is to curtail membership



solicitation and distribution of union material during working hours, and thus does not contravene section 64;

- (e) the decision of the University was consistent with its obligation under section 64; and
- (f) CUPE is attempting to ride the coat-tails of the UTSA and obtain a benefit which is not available to those individuals who may oppose it. Each time a CUPE item is "mailed" through the system a benefit of at least \$.37 is received by CUPE. At least 30,000 items have been delivered to employees on behalf of CUPE.

3. The simple answer to the issue before us is found in section 64 of the Act. That section tells employers that they never have to act as agents of a trade union. When CUPE seeks to use the University's property, the internal mail system, then the obligations under section 64 take effect. The employer is obligated not to interfere in the debate. The use of the internal mail system must be denied to both the proponents and opponents of CUPE.

4. The UTSA has no status before the Board as a trade union under the Act. In that respect it is no different from any staff committee or association that we often find in the workplace. Having no status before us, the UTSA is unable, on its own account, to enforce any rights under section 64 of the Act. That is why CUPE brings this complaint on behalf of Mr. Askeff, an individual, and not on behalf of the UTSA. The problem for CUPE is that Mr. Askeff has no right to mailing labels or to use the internal mail system. Only UTSA (whatever it may be) has been granted that privilege by the University.

5. Since the UTSA differs in no way from any other group of employees in the workplace, the fact that this group calls itself the UTSA must be irrelevant to their right to have CUPE apply for certification on their behalf. To say otherwise is to call into question before us the nature of the UTSA (i.e. who are its members and what support does the employer give it), which information may be detrimental to the certification application of CUPE. The knife cuts both ways.

6. The reasoning of my colleagues also cuts both ways in that it gives new rights to those who oppose the formation of a trade union or to those who wish to replace their existing union with a new one. If the UTSA was opposed to CUPE, then it could use the internal mail system to circulate its views, and neither the employer nor CUPE could complain. The labour relations community will immediately compile a long list of decision-making problems for the Board with regard to issues which the community had rightly thought were "put to bed" in earlier decisions of the Board.

7. I would enforce the simple wording of section 64 and section 71 of the Act. I would make the employer play a neutral hand in this game of choice. I would dismiss this application.

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**2182-86-M; 2191-86-M United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552, Applicant v. The Board of Education for the City of Windsor, Respondent**

**Collective Agreement - Construction Industry Grievance - Windsor Board of Education found to be an employer in the construction industry - Employer relying on "gentlemen's agreement" as constituting a bar to the union's contracting out grievance - "Gentlemen's agreement" null and void as it applies to the ICI sector - Whether union estopped from enforcing the ICI agreement because of the existence of the "gentlemen's agreement" - Elements of estoppel not satisfied - ICI agreement violated**

**BEFORE:** *Patricia Hughes*, Vice-Chair, and Board Members *R. Sloan* and *J. Sarra*.

**APPEARANCES:** *Mark Zigler* and *Jerry Boyle* for the applicant; *Leon Paroian*, Q.C., *Brian P. Nolan* and *William Pilotis* for the respondent.

**DECISION OF VICE-CHAIR PATRICIA HUGHES AND BOARD MEMBER J. SARRA;** March 4, 1988

1. Each of these matters is a referral of a grievance to arbitration before the Board under section 124 of the *Labour Relations Act* ("the Act") in which the applicant is the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 ("the Union", "the Plumbers" or "Local 552") and the respondent is The Board of Education for the City of Windsor ("the Windsor Board", "the Board of Education" or "the W.B.O.E."). The grievances were delivered to the Windsor Board on September 3, 1986; the referral in File No. 2182-86-M was filed with the Board on October 29, 1986 and that in File No. 2191-86-M on October 30, 1986.

2. Crucial to the resolution of these grievances is the determination of which collective agreement between the Union and the Board of Education applies to the work which is the subject of the grievances. The Union contends that the Ontario Provincial Collective Agreement between the Mechanical Contractors Association of Ontario and the Ontario Pipe Trades Council ("the Provincial Agreement" or "the ICI Agreement"), effective from May 1, 1984 until April 30, 1986 and from May 1, 1986 until April 30, 1988 to which it and the Board of Education are bound is the applicable agreement. The Windsor Board maintains it is not bound by the Provincial Agreement with respect to the matters raised by these grievances, but rather by a collective agreement executed by the parties on March 17, 1985, intended to cover "plumbers and pipefitters in the Board [of Education]'s Maintenance Department" ("the Maintenance Agreement"); it expired on April 30, 1986 and is the subject of renewal negotiations. These grievances allege contraventions of the Provincial Agreement.

3. The grievance in File No. 2181-86-M alleges that the Board of Education has not paid wage rates, overtime and shift premiums and vacation pay to Tim Slote, Mike Samson and Casey Heeren ("the temporary plumbers") for work performed by them from June 3, 1985 to November 7, 1985 and from May 12, 1986 to September 1986 (when the grievances were delivered to the Windsor Board) in accordance with the ICI Agreement ("the wages grievance"). Local 552 maintains that these men were referred through its hiring hall and were performing construction work; they were, therefore, covered by the ICI Agreement, and should have been paid ICI rates, but were in fact paid a rate lower than the ICI rate; however, they were paid benefits under the ICI Agreement, subject to minor adjustments, except for vacation pay.

4. The grievance in File No. 2191-86-M alleges that the Board of Education has subcontracted construction work to contractors or employers who are not bound by the Provincial Agreement in contravention of that Agreement (“the contracting out grievance”). This grievance thus refers to work the Union contends is covered by the Provincial Agreement, but which was performed by people who were not members of the Union and who were employed by contractors not subject to the Provincial Agreement.

5. With respect to both grievances, the Windsor Board states that it is not bound by the Provincial Agreement, because it contracted out work as an owner (that is, it did not sub-contract out work as an employer in the construction industry) and because the temporary plumbers were not doing construction work, but that even if it is so bound, the Union is estopped from enforcing the provisions of the Provincial Agreement because of “an agreement entered into between the [Union] and the [Windsor Board] made in or about the month of July, 1984, based upon which the [Windsor Board] entered into a maintenance agreement [that is, the Maintenance Agreement] with the [Union]”. The “agreement” allegedly entered into in July 1984 has been termed “the gentlemen’s agreement” by the parties who agree such an agreement had been entered into but differ on its terms and ramifications. The Windsor Board also maintained on the first day of hearing that the wages grievance is untimely.

6. The Windsor Board takes two positions with respect to its contention that the Provincial Agreement does not apply to it: it first requests that the certification decision which found the Board of Education to be an employer in the construction industry be reconsidered (see *The Board of Education for the City of Windsor*, [1983] OLRB Rep. May 831 [“the certification decision”]); and it contends that regardless of whether it has been found to be an employer in the construction industry, it is not an employer with respect to the work at issue. We deal first with the Board of Education’s request that we reconsider the certification decision. We heard submissions from the parties on the preliminary matter of whether it was appropriate for us to reconsider that decision.

#### **Whether We Should Reconsider the Certification Decision**

7. The Union had been granted bargaining rights for the non-construction or maintenance work of the Board of Education on February 27, 1967. On May 18, 1983, the Union was certified by the Board as the bargaining agent of all plumbers and plumbers’ apprentices in the employ of the Board of Education in the counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman; it was further certified, on its own behalf and on behalf of all other affiliated bargaining agents of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, a designated employee bargaining agency, as the bargaining agent of all plumbers and plumbers’ apprentices in the employ of the Board of Education in the industrial, commercial and institutional sector in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman: *The Board of Education for the City of Windsor*, *supra*. In other words, Local 552 was certified, in the usual manner, under the construction industry provisions of the Act, to represent plumbers employed by the Board of Education in all sectors of the construction industry, except the ICI sector, in the counties of Kent and Essex, and to represent plumbers employed by the Board of Education in the ICI sector in the Province of Ontario, pursuant to subsection 144(2) of the Act. As a consequence of the latter certification, the Board of Education became bound by the Provincial Agreement, in accordance with subsection 145(4) of the Act.



8. In certifying the Union under the construction industry provisions of the Act, the Board rejected the Board of Education's submission that it was not an employer within the meaning of section 117 of the Act (which states that "employer" means a person who operates a business in the construction industry"), that it did not carry on business in the construction industry and did not employ any plumbers, pipefitters, steamfitters or their apprentices in the ICI or any other sector of the construction industry. The Board found that the Windsor Board was engaged in repair work which falls within the definition of construction work under clause 1(1)(f) of the Act which reads as follows:

"construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof.

The Board concisely summarized the Board's jurisprudence on the meaning of the phrase "employer in the construction industry" at paragraph 10 of the certification decision:

10.... There can be no doubt that the principal business of the [Windsor Board] is that of education. As a necessary part of its principal business of providing services and education, the [Windsor Board] must necessarily perform a variety of ancillary activities. Such activities or business consist of routine maintenance with respect to its buildings, and towards the end of 1982, the modernization and repair of its heating system as referred to previously. In *Tops Marina Motor Hotel* 64 (3) CLLC ¶16,004, the Board held that in order to operate a business in the construction industry, the construction business need not be the principal or only business of the employer of the labour. Similarly, the Board has also held that on occasions a board of education may enter into a business in the construction industry. See: *Kapuskasing Board of Education*, [1972] OLRB Rep. June 583. In addition, the Board has also found that municipalities may on occasions operate businesses in the construction industry. See, for example, *City of Toronto*, [1978] OLRB Rep. Dec. 1145 and *Municipality of Metropolitan Toronto*, [1980] OLRB Rep. Jan. 62. The Board has also held that an employer may simultaneously carry on businesses of maintenance and construction. See, for example, *M. G. Burke Investments*, Board File No. 0640-76-R, decision dated February 28, 1978. In considering whether a business is being operated, the Board has also held in the *Kapuskasing Board of Education*, *supra*, that it is not necessary that the business be carried on with a view to making a profit. See also, the *Municipality of Metropolitan Toronto*, *supra*. The work performed on the date of the filing of this application is clearly work which would fall within the industrial, commercial and institutional sector of the construction industry. There can be no doubt that work performed on schools falls within the institutional portion of the industrial, commercial and institutional sector. The fact that the respondent has not previously been "a member of an employer bargaining agency" and may not have previously performed work in any sector of the construction industry does not insulate the respondent from the consequences of its activities in the construction industry on the date of the filing of this application.

9. Among his other submissions in support of its request that we reconsider the certification decision, counsel for the Board of Education maintained that there had been a material change in circumstances since the certification decision in the form of the Supreme Court of Canada's decision in *Construction Industry Commission v. Montreal Urban Community Transit Commission* (1986), 31 D.L.R. (4th) 641, which deals with the scope of the Quebec *Construction Industry Labour Relations Act* ("the C.I.L.R.A."). The Court held that the legislation at issue covered "activities" and therefore one must look at the nature of work performed and not only at the status of the parties to determine whether a particular employer is covered by the legislation. It found that the Transit Commission is a "non-professional employer" but that although the legislation provided an exception for non-professional employers with respect to maintenance and repair work done by their permanent employees, the work at issue was construction work and therefore was covered by the C.I.L.R.A. Although the definition of "construction" in the C.I.L.R.A. includes "maintenance" and "repair", among other activities, there is an explicit exception for employers "whose main activity is [not] to do construction work" where the work performed is

maintenance and repair work done by permanent employees hired directly by the employer. (The Ontario *Labour Relations Act* explicitly includes repair work as construction work, but does not include maintenance work; there is no exception for employers whose main activity is not construction work.) Counsel relied on the *Montreal Urban Community Transit Commission* case for the proposition that this Board must give the words of the Act a literal interpretation rather than speculate on the legislative intention behind the words. The reasons of the late Mr. Justice Chouinard, in which the other justices concurred, make it clear that the principle that the court (and administrative tribunal) is to give effect to the intention of the legislature in its interpretation of legislation and to determine that intention by reference to the words of the statute is not new, but a basic principle of interpretation. It is one which this Board follows in its capacity as tribunal expert in matters of labour relations.

10. After recessing to consider the submissions of counsel for both parties, we delivered the following oral ruling:

Although there was no request for reconsideration filed by the respondent in conformity with Practice Note 17 of the Board's Rules of Procedure, Regulations and Practice Notes, we are urged by counsel for the respondent to deal with the issue today in order to expedite this matter.

Requests for reconsideration are considered by the panel which heard the case originally. We are not the panel who heard and determined the certification application in 1983 and we are not prepared to reconsider that decision. In any event, it is clear that a party cannot reargue a case on reconsideration. The respondent has put before us no new evidence which it could not have placed before the original panel, nor does it argue there is any such evidence. Nor are any of the other grounds for reconsideration satisfied. The major ground advanced by the respondent is that the *Montreal Urban Community Transit Commission* case constitutes a material change in circumstances, in effect "new law", since the certification decision. [Even assuming that a case could affect a decision made three years earlier], that case does not address itself to a statute containing a privative clause; furthermore, the approach taken by the Board in the certification decision was that approved by the Divisional Court in *Re City of Toronto and Carpenters' District Council of Toronto and Vicinity* (1980), 27 O.R. (2d) 673 which applied the "patently unreasonable" test to the Board's interpretation of the relevant sections. Nothing in the Quebec case suggests that this is not the proper test in the context of the Ontario legislation, and for this reason [and because the principle referred to by counsel for the respondent concerning the "literal interpretation" of the words of the statute, is not new], we are of the view that the case does not represent a material change in circumstances.

Accordingly, even if it were appropriate for us to reconsider the certification decision, there would be no basis for our doing so.

11. In confirming its jurisprudence in this area in *Abitibi-Price Inc.*, [1986] OLRB Rep. Dec. 1613, the Board reiterated that the test is whether the respondent operates a business that is engaged in one of the activities set out in clause 1(1)(f) of the Act. It pointed out that the Legislature has amended the construction industry provisions since the Board first interpreted the meaning of the phrase "employer in the construction industry" in the *Tops Marina* decision, *supra*, in 1964 and that in doing so, "it was well aware of the kinds of employers which were being found by

the Board to be operating businesses engaged in the construction industry". Nevertheless, the Legislature did not amend the Act to exclude certain kinds of employers from the construction provisions and therefore "[i]t is not unreasonable ... to infer that the Board's interpretations have met the statutory purpose intended by the Legislature for the construction industry provisions of the Act".

### **Whether the Windsor Board is an Employer in the Construction Industry**

12. Counsel for the Windsor Board raised again at a later stage in the proceedings the argument that the Windsor Board is not an employer in the construction industry. The Board of Education contends that no employees of the Board were doing work which was the subject of the contracting out grievance; rather, he maintained, the Board contracted as owner to have the work done, it did not sub-contract the work. Put another way, the Board of Education's position is that it was not in an employment relationship with any persons who were working on those jobs and that, furthermore, the employment relationship of those persons is with the general contractor whom the Board of Education hired or with any sub-contractor hired by the general (no evidence was put before us with respect to any such employment relationships).

13. The Board in *Kapuskasing Board of Education*, [1981] OLRB Rep. Mar. 300 ("Kapuskasing Board (No. 2)") found that the Kapuskasing Board of Education ("the Kapuskasing Board") was not an employer in the construction industry with respect to the work at issue, although it had been found to be an employer in the construction industry in *Kapuskasing Board of Education*, [1972] OLRB Rep. June 587 ("Kapuskasing Board (No.1)"). In *Kapuskasing Board (No.2)*, *supra*, the Kapuskasing Board awarded a contract for the entire project of adding an addition to a school, after soliciting tenders, to a general contractor not bound by the provincial agreement by which the Kapuskasing Board and the applicant, United Brotherhood of Carpenters and Joiners of America, Local Union 1669 and the Ontario Provincial Council of Carpenters, were bound ("the Carpenters Provincial Agreement"); persons directly employed by the general contractor worked or were to work on the project, as well as employees of several sub-contractors. The Board held that

[i]n that the respondent is not directly employing any labour on the school project, and is also not acting as its own general contractor, we are of the view that it is not at the current time an employer in the construction industry. Instead, its status is that of an owner who has let a contract for an entire project to a general contractor. *It may well be that an owner can be obligated by the provisions of a collective agreement to let out contracts only to general contractors in contractual relations with a particular trade union. However, the language in article 4.01 of the agreement before us does not contain such a restriction. Article 4.01 has reference only to the subcontracting out of work.* Subcontracting involves the awarding of a secondary contract, whereby a subcontractor undertakes to perform certain of the obligations previously assigned to a principal or prime contractor. In the instant case, the respondent, in its capacity as an owner, has let a primary contract to a general contractor. The general contractor has, in turn, subcontracted certain of the work to other employees. (emphasis added)

14. In *The Brant County Board of Education*, [1984] OLRB Rep. Oct. 1349 ("Brant County (No. 1)"), the applicant union, the International Union of Bricklayers and Allied Craftsmen, Local Union No. 9 ("the Bricklayers") and the Brant County Board of Education ("the Brant Board") were bound by the provincial-wide agreement covering the Bricklayers ("the Bricklayers Provincial Agreement"), the Brant Board having been found by this Board to be an employer in the construction industry. The Brant Board gave a contract to a company not bound by the Bricklayers Provincial Agreement. The Board was required to determine whether the Brant Board was an "employer in the construction industry" at the time it awarded the contract. The Board explained that "[d]epending on the nature of projects undertaken and one's involvement in those



projects, an entity can change from being the operator of a business in the construction industry and thus an 'employer', to be [sic] simply being an 'owner' of property who purchase[s] construction or masonry services". The Board found that the Brant Board, in letting out the contract for the work in question, was still an employer in the construction industry. It distinguished the facts of the case before it from the facts in *Kapuskasing Board (No. 2)*, *supra*. The Board in *The Brant County (No. 1)* case, *supra*, indicated that the following factors, among others, are relevant in determining the status of the respondent: the nature of the work being performed, the degree of control exercised by the respondent over the project, "the work, the materials and the manpower as well as its participation, if any, in the project in question". The same parties were involved in *Brant County Board of Education*, [1986] OLRB Rep. Sept. 1187 ("*Brant County (No. 2)*") in which the Board phrased the issue as follows: "the employer does not have employees, but if it is operating a business in the construction industry, [is] the respondent ... caught by the subcontracting clause in the collective agreement between the employer and the trade union" or "can an employer, bound by a provincial agreement, *purchase* construction outside the scope of the subcontracting clause, that is, can the employer act as a *purchaser only* and not as a person operating a business in the construction industry?" (emphasis in original). The Board considered that the control exercised by the respondent over the job is a particularly significant criterion and found that the respondent was making a business decision about the contractor who was to do the work, that is, whether the contractor was competent to do the work, "which is essentially a business decision frequently made by contractors and is thus engaging in a business in the construction industry" and exercised sufficient control over the work in the three grievances before the Board in that case to be engaged in construction.

15. The language of the relevant clause in the Provincial Agreement before us is broader than that in the Carpenters Provincial Agreement, which was at issue in *Kapuskasing Board (No. 2)*, *supra*, and which referred only to "subcontracting", a term carefully noted by the Board in that case. The clause in the Bricklayers Provincial Agreement uses similarly limited language. The equivalent clause in the Provincial Agreement before us, in contrast, reads as follows:

#### ARTICLE 11 -- SUB-CONTRACTING

11.1 Recognizing that the Contractor can sub-contract, no Contractor shall directly or indirectly sublet or sub-contract or otherwise transfer to any employee or any other employer not signatory to a U.A. agreement any of the work coming under the jurisdiction of this agreement.

"Contractor" is defined in Article 1 of the Provincial Agreement as "an employer performing Mechanical work in the Industrial, Commercial, and Institutional Sector of the Construction Industry under the terms of this Collective Agreement and any successor or assign". Since it directly hired the temporary employees, who we find below were performing mechanical work in the ICI sector, the Windsor Board is an employer in the construction industry and is therefore bound to the ICI Agreement pursuant to subsection 145(4). It is, accordingly, a "contractor" within the meaning of the ICI Agreement and, consequently, is prohibited from transferring Plumbers work in any manner to an employer who does not have a bargaining relationship with the Plumbers. Counsel for the union advised us that the wording in Article 11 was in response to the limited interpretation given Article 4.01 of the Carpenters Provincial Agreement in *Kapuskasing Board (No. 2)*, *supra*. Whether that is the case or not, and despite the title and opening words of Article 11, the inclusion of the phrase "or otherwise transfer" is broad enough to capture work that could be performed by the Board of Education itself. The work which is the subject of the relevant contracts before us (which we consider in greater detail below) is such work. Accordingly, even if the Windsor Board did contract out the projects at issue, as owner or purchaser, it is not relieved of its obligation to contract out to union contractors, pursuant to Article 11 of the Provin-

cial Agreement. That result was contemplated by the dictum of the Board in *Kapuskasing Board (No. 2)*, *supra*.

### The Nature of the Work at Issue

16. Related to the question of the Windsor Board's status is that of the nature of the work which was performed by the temporary plumbers and which was the subject of the contracts which are named in the contracting out grievance. The work was described in detail by Alan Lawrenson, foreman of the Windsor Board's mechanical electrical division, who was called as a witness by the union. He supervises both the temporary plumbers and the four permanent plumbers employed by the Board of Education ("the permanent plumbers"). He is, therefore, familiar with all the work done by plumbers for the Windsor Board. The work which is the subject of these grievances is carried out at the schools belonging to the Windsor Board primarily over the summer months while the schools are empty of students, although it may also extend into the fall months. The projects are planned in advance, involve structural and other changes, are considered to be "larger projects", and are therefore best completed while the schools are not populated. Temporary plumbers are hired to work on the summer projects while the permanent plumbers generally carry on the day-to-day maintenance work throughout the year (Mr. Lawrenson explained that they do whatever comes up on a particular day). The parties have agreed that the permanent plumbers are mainly involved in maintenance (and therefore non-construction) work, and do only a small percentage of construction work, perhaps five per cent of their total work. (It is also common ground that the union has advised the Windsor Board that it will not grieve construction work done by the permanent plumbers paid at the Maintenance Agreement rates.)

17. The 1985 and 1986 summer projects at issue involved such activities as taking old filters out of a swimming pool and putting in new filters, installing new pumps with the associated piping and putting in a heat exchanger; remodelling regular washrooms for use by handicapped students; renovations of regular washrooms, including the installation of urinals, handbasins, toilets, floor drains, slop sink, water piping and venting in one case and basins and toilets in another; removing asbestos; removing portions of a cast iron sectional boiler and replacing them, necessitating taking the boiler apart and putting it together again; removing an old boiler and putting in a new one; installing a boiler in order to heat green houses; installing new pipe in connection with the water-main; putting in heat control valves and steam traps; replacement of steam radiators by drain vectors; the installation of new condensate receivers; the installation of rain water leaders; and renovating classrooms, for example, to make one room a music room, including putting in a sink and installing a sprinkler head over the stage area.

18. The work which is the subject of the contracting out grievance consists of the following: the renovation of a science room at Riverside Secondary School by Dalla Bona Construction; the renovation of interior classrooms at Marlborough Public School by Roko Construction; alterations to Walkerville Secondary School, including washrooms and showers, also by Roko Construction; and additions and alterations, including the installation of handicapped washrooms, at Riverside Secondary School by Fregonese Construction Inc. This work was all requisitioned in either May or July 1986.

19. Clause 1(1)(f) of the Act defines "construction industry" and by necessary implication, "construction work", as

the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof.

The major distinction that has developed between “maintenance”, which is *not* considered construction work, and “repair”, which *is* considered construction work, was summarized by the Board in *The Master Insulators’ Association of Ontario Inc.*, [1980] OLRB Rep. Oct. 1477 as follows:

29. ...[I]t is a question of the context of any given work and the degree of addition or subtraction of such work to an existing system or part of a system. Where the work assists in preserving the functioning of a system or part of a system, such work is maintenance work. Where the work is necessary to restore a system or part of a system which has ceased to function or function economically, such work is repair work. “Maintenance” and “repair” are not mutually exclusive concepts, and lack of adequate maintenance will surely produce a situation where repair becomes inevitable. In our view, the performance of adequate and timely maintenance forestalls or reduces the requirement for repair.

The Board also stated that “[m]aintenance work is to be distinguished from construction work which involves the addition to an existing facility or which will increase the designed or production capacity of an existing facility”. (Also see *Inscan Contractors (Ontario) Inc.*, [1986] OLRB Rep. May 640.)

20. There is obviously a blurring between maintenance and construction work; nevertheless, work can be designated as one or the other by taking into account the definition of “construction industry” in the Act and the guidelines set out above. The vast proportion of the work performed on the summer projects by the temporary plumbers is more than day-to-day maintenance work or even irregular maintenance work. In some instances (the washrooms or the music room, for example), there is clearly alteration to the building; in other instances, such as some of the work relating to the boilers, it is more appropriately described as “repair”. Such work can be compared to the work performed by the permanent plumbers, as described by Mr. Lawrenson: he testified they do whatever requests come in from the schools; for example, if a toilet will not flush or a drinking fountain, urinal, steam trap or control valve will not work or a pipe leaks, the permanent plumbers might unclog the drain, fix the leak and other equipment or (and this is not clearly maintenance), if necessary, replace the toilet if it is broken. The summer projects represent a substantial capital outlay by the Windsor Board from a budget separate from that intended for maintaining equipment or structures. On balance, we conclude that all the work done by the temporary plumbers, except the replacement of swimming pool filters (which was done in conjunction with work that is properly considered construction), falls within the definition set out in clause 1(1)(f) of the Act and is construction work. Similarly, the work which is the subject of the subcontracting grievance is also construction work.

21. We therefore conclude that the Windsor Board was acting as an employer in the construction industry with respect to the work at issue in these grievances.

#### **The Maintenance Agreement, “the Gentlemen’s Agreement” and Subsection 146(2) of the Act**

22. Throughout the hearing into these referrals, we heard about the “gentlemen’s agreement” that had been reached in conjunction with the Maintenance Agreement. The Windsor Board relies on this gentlemen’s agreement as constituting a bar to the union’s contracting out grievance. The parties do not agree on the terms of the gentlemen’s agreement, however, nor on the effect it has on the employment relations between them. In order to appreciate the nature and significance of the gentlemen’s agreement, some understanding of the history of the relationship between the Windsor Board and the Plumbers is necessary.

23. Bill Piliotis, the employee relations administrator with the Windsor Board, explained the history of the Board of Education’s bargaining with the skilled trades. None of the unions



representing the skilled trades were or are certified under the construction provisions of the Act with respect to the employees of the Windsor Board, except the Plumbers who were not certified until 1983. From the late 1960's to the early 1980's, the Windsor Board was under an informal agreement by which it would pay their skilled trades people the wages the skilled trade unions had negotiated for their construction workers minus benefits; the Board of Education thus paid 90% of the construction rates (and later 85% of the construction rates). The Board of Education's benefit package, which was paid instead of the construction benefits, included insurance, health care, drug and medical benefits, OHIP, the Ontario Municipal Employees Retirement System ("OMERS", the pension plan), vacation, statutory holidays and a sick leave scheme. The package is much the same today. In 1981 or thereabouts, following the settlement of a grievance brought by the Carpenters under the construction industry provisions of the Act (the settlement was apparently on the basis that the Carpenters had never been certified under the construction industry provisions), the Board of Education "considered itself obligated" to negotiate an agreement with the Carpenters. As a result of an overture by Mr. Piliotis, the unions representing carpenters, plumbers, electricians, painters, bricklayers and labourers and the Board of Education met, and the unions agreed to form an informal council and negotiate with the Board of Education for the same working conditions, but different wage rates. Jerry Boyle, the business agent for Local 552, represented the Plumbers, but at the end declined to sign the agreement reached between the other trades and the Windsor Board. The refusal of Mr. Boyle to sign appears to have stemmed from the contracting out clause in that agreement which reads as follows:

No employee covered under the terms of this Agreement shall suffer demotion or lay off as a result of contracting out of work normally performed under the terms of this Agreement.

(The same clause appears in the Maintenance Agreement eventually signed by the Plumbers and the Windsor Board.) The Windsor Board signed a two year agreement with each of the other unions and paid the rate in that agreement, regardless of whether they were using temporary or permanent employees. In 1983, the Plumbers were certified under the construction industry provisions of the Act; Mr. Piliotis said that following certification and in the absence of an agreement with the Plumbers similar to that with the other skilled trades, the Board of Education "made the decision to have the ICI Agreement apply to the plumbers working for the Board [of Education]". The Board of Education then "laid-off" the four permanent plumbers; that conduct was found to be an illegal lockout by the Board which ordered the plumbers reinstated (see decision in File No. 3113-83-U, August 8, 1984). The four permanent plumbers began working under the ICI Agreement in the spring of 1983 and were paid the full ICI rate and benefits; they no longer received the Board of Education benefits, including participation in OMERS. The contributions of the employees who had over ten years service vested in OMERS but there was no further accumulation of pension benefits under that system.

24. By letter dated June 18, 1984, Mr. Boyle wrote to Wayne Mickle, the personnel manager for the Windsor Board, who is responsible for the hiring of all non-teaching staff, as well as salaries and administration for teaching and non-teaching employees, advising him that the Plumbers wished to negotiate a maintenance agreement with the Windsor Board similar to that covering the other trades and that "[t]his union must insist on the appropriate contracting - sub-contracting clauses to protect our current employees with the W.B.O.E. and our jurisdiction". Mr. Boyle further advised Mr. Mickle that "[t]hese arrangements in no way are to be interpreted that this Local has abandoned its bargaining rights in the construction industry with respect to the employees of the W.B.O.E., which we hereby confirm". Mr. Boyle's suggestion to enter into a maintenance agreement was motivated by a desire to protect the employment stability of the four permanent employees as well as their participation in OMERS. Negotiations began on August 14, 1984, with the Board of Education taking the position that since the Plumbers had been certified under the

construction industry provisions and the Board of Education was paying ICI rates, there was nothing to discuss. It is clear from the Board of Education's Minutes ("the Minutes") of that meeting that the crucial issue remained contracting out. It is also clear that the Windsor Board was concerned to protect its existing arrangements with the other skilled trades; it did not want them to follow in the Plumbers' path by obtaining certification under the construction industry provisions of the Act, thereby making the Board of Education subject to the ICI agreements for those trades.

25. At a subsequent meeting at the end of January 1985, the Board of Education stated that it would discuss a maintenance agreement only if the Union agreed to set aside its bargaining rights under the ICI agreement: the Board of Education was not prepared to operate under two agreements. The first mention of a "gentlemen's agreement" was made by Mr. Pilotis at this meeting, characterized by the Minutes as: "if the plumbers are satisfied with the maintenance agreement, the ICI agreement will sit there and the plumbers will not use it to come back on the Board". The Minutes record that "J. Boyle asked for an example indicating that he would certainly come back on the Board if non-union people were hired". Mr. Pilotis then indicated that the Board of Education's concern was "whether the plumbers are going to be looking over the Board's shoulder on every issue".

26. Concern with the construction agreement was also expressed by Harold Musson, a Trustee for the Windsor Board, who indicated that he and another Trustee, Ronald Jones, were concerned about the costs of the 1985 negotiations, as well as "our ability as a Board to provide proper plumbing services because of the construction agreement". They saw the Union's concerns as wanting to protect the four permanent plumbers and preventing contracting out to non-union contractors, and in addition, correcting the discrepancy in base rates between those paid to the electricians and those paid to the plumbers (at that time, the electricians were earning more than the plumbers, an anomaly in the Province). Mr. Musson's view was that the Board of Education had an obligation to hire the lowest bidder, union or non-union: it would not seek to hire non-union but if the lowest bidder were non-union, it should not be treated as a "precedent".

27. In the early part of February 1985, Mr. Musson and Mr. Jones met with Mr. Boyle and Murray Inverarity Jr., then with the Union and now an official with the Board of Education, in Mr. Musson's office at the University of Windsor where he teaches corporate finance. They reached what Mr. Musson understood as a "consensus" that the trustees would go to the negotiators for the Board of Education with a proposal to bring the plumbers up to the electricians' rates over a period of time and not to make a habit of hiring non-union contractors in return for the Union's agreeing that the Board of Education could continue to "operate as we had" under a maintenance agreement. The Board of Education's administrators were never apprised of the meeting but were given a recommendation based on the "consensus" by the trustees' policy committee. Mr. Musson testified that the informal agreement reached at the meeting in his office became the more formal agreement between the two negotiating teams.

28. At the next negotiating meeting between the Board of Education and the Plumbers, on February 19, 1985, the Board of Education pointed out that it had a tendering policy requiring it to give contracts to the lowest bidder; under the ICI Agreement, that policy would be null and void because it would prevent the Board of Education's accepting the lowest bid if it came from a non-union contractor. The Board of Education was prepared to enter into the maintenance agreement desired by Mr. Boyle in order to give his members a better benefit package (particularly participation in OMERS) in exchange for the union's "setting aside" its rights (particularly its contracting-out rights) under the ICI Agreement. The Board of Education understood that the union had a "political" problem in "setting aside" the ICI Agreement and therefore again proposed a compromise: in 99% of the cases, they would contract out to union contractors; they would sign the main-



tenance agreement to cover all the plumbers in return for the Plumbers waiving grievances in “isolated” cases where the bid went to non-union contractors, but if the awarding of contracts to non-union contractors became a pattern, the union would be justified in invoking the ICI Agreement. At the February 19th meeting, the Union said it was prepared to sign on that understanding.

29. The Maintenance Agreement was finally signed on March 17, 1985, apparently to the relief of all concerned. We are satisfied that there was a “gentlemen’s agreement” between the parties complementary to the Maintenance Agreement. Both sides had certain interests to protect and they reached a practical accommodation which they thought would have that result. Mr. Boyle’s desire to negotiate a maintenance agreement was predicated on the need to protect the four permanent plumbers employed by the Windsor Board. A maintenance agreement was appealing to the officials of the Windsor Board because, as they saw it, it permitted them to carry on business in the manner to which they had become accustomed until the 1983 certification, a certification with which they have never been comfortable. Avoiding the ICI Agreement was in itself an attraction; in addition, however, the Board of Education was able to obtain the concession from Mr. Boyle that he would not enforce the Plumbers’ rights under the ICI Agreement with respect to contracting-out where contracting-out to non-union contractors occurred only “occasionally”, a concept which, although agreed to by the parties, had very little definable content.

30. We understand the terms of the “gentlemen’s agreement” to be as set out in the first paragraph of the Board of Education’s Minutes of the February 19th meeting held between the Board of Education and the Plumbers as follows:

The understanding regarding the contracting out issue is that it will be a gentlemen’s agreement and the parties will try not to offend the ICI agreement and certification. If there are isolated cases in which the Board [of Education] contracts out a job to a non-union contractor, the Union will not confront the Board [of Education].

In our view, the so-called “gentlemen’s agreement”, which deals directly with the contracting out of construction work and which is premised on a “setting aside” of the ICI provisions, contravenes subsection 146(2) of the Act. Subsections 146(1) and (2) of the Act state as follows:

146-(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers’ organization, group of employers’ organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

The “gentlemen’s agreement” is a form of “other arrangement affecting employees represented by [an] affiliated bargaining agent[] other than a provincial agreement as contemplated by subsection [146](1) [of the Act]” and as such is null and void.

31. Article 2.01 of the Maintenance Agreement states that

[t]he Board [of Education] recognizes the Union as the sole collective bargaining agency for all of its employees with respect to rates of pay, hours of work and working conditions who are employed as plumbers and pipefitters in the Board’s Maintenance Department, save and except Foremen and persons above the rank of Foreman.

In the Board of Education’s understanding, the Maintenance Agreement applies to all plumbers,



permanent and temporary; that understanding is based on the assumed similarity between the Maintenance Agreement and the agreements with the other skilled trades which cover the temporary employees at rates lower than the ICI rates for the trades. Mr. Boyle's June 18th letter expressly referred to a "Maintenance Agreement", with similar hours of work, rates of pay, etc., that other trades have established". This was one reason Mr. Pilotis believed Mr. Boyle also knew that the other trades were being paid the maintenance rate for temporary employees. At the second meeting for negotiations for the renewal of the Maintenance Agreement, however, it became clear that Mr. Boyle believed -- erroneously -- that the temporary employees hired to do skilled trade work in other trades were paid the construction rates. In a letter dated March 6, 1985, furthermore, Mr. Boyle informed Mr. Pilotis that the Maintenance Agreement had been ratified. Mr. Boyle confirmed the union's understanding of the discussions surrounding that Agreement:

As per our discussion the Board [of Education] recognizes our bargaining rights for maintenance, I.C.I. and other construction. The four current employees will be working under the maintenance agreement while in the employ of the Board [of Education]. Seniority for the four members will go back to their respective original dates of hire which will restore their accumulative sick days. Their benefits will be back with the Board as of March 4, 1985, with the wage and hours of work adjusted accordingly.

After considering all the evidence, including the fact that temporary plumbers were not hired until 1985, after the Maintenance Agreement had been signed, and the failure to mention them in the Minutes of the negotiating meetings kept by the Windsor Board, plus the testimony of Mr. Boyle (and his apparent belief that the agreements with the other trades provided for construction rates for temporary employees) and the work the temporary plumbers were doing and were obviously intended to do, we conclude that the only plumbers in the consideration of the parties when they negotiated the Maintenance Agreement were the four permanent plumbers. The Maintenance Agreement covers only the four permanent plumbers. Counsel for the Windsor Board submits that if the Maintenance Agreement were intended to apply only to the permanent plumbers, a specific restriction should have been included in Article 2. That argument might have some validity if the work being performed by the temporary plumbers were maintenance work. But no explicit exclusion is required with respect to temporary plumbers doing construction work; since by law the Maintenance Agreement cannot apply to persons engaged in construction work, it can be inferred that it refers only to the permanent plumbers unless the evidence supports a contrary intention by the parties.

32. We have found that the temporary plumbers were performing construction work and that the Windsor Board is their employer and therefore the ICI Agreement applies. If the Maintenance Agreement had been intended by the parties to apply to the temporary plumbers when they performed the work on the summer projects, that Agreement would contravene subsection 146(2) of the Act and would be null and void. We do not believe that under those circumstances we would be required to declare the Maintenance Agreement null and void in its entirety, but only to the extent that it constitutes an agreement other than the ICI Agreement provided for under subsection 146(1) of the Act. It would be null and void to the extent it purported to apply to the temporary plumbers on the summer projects. As for the permanent plumbers, the parties have agreed that they perform maintenance work almost entirely and although we have some evidence that the permanent and temporary plumbers were at times working on the same jobs, we are not required to determine whether they are in fact performing construction or maintenance work (nor do we have sufficient evidence to make that determination). More importantly, the issue of whether the Maintenance Agreement contravenes the Act *insofar as it applies to the permanent plumbers* is not before us and we reach no conclusions about that issue.

### Whether the Doctrine of Estoppel Applies

33. The Windsor Board contends that even if the “gentlemen’s agreement” is null and void, it functions to estop the union from grieving the Windsor Board’s contracting out to non-union contractors, presumably to the extent the contracting out is consistent with the gentlemen’s agreement. (We note that while in its Reply and in its Statement of Fact and Law, the Windsor Board appeared to be relying on the “gentlemen’s agreement” with respect to both grievances, counsel for the Windsor Board in argument informed us that it is not the Board of Education’s position that the temporary plumbers formed any part of the gentlemen’s agreement; accordingly, we consider the estoppel issue in the context of the gentlemen’s agreement only with respect to the contracting-out.)

34. The elements of estoppel are set out in the Board’s decision in *Inscan Contractors (Ontario) Inc.*, *supra*, at paragraph 24, as follows:

- (1) a finding that there has been a representation by words or conduct intended to be relied on by the party to which the representation was directed;
- (2) some reliance on the representation in the form of some action or inaction; and,
- (3) detriment resulting from reliance on the representation.

(Also see the description of estoppel cited from *Combe v. Combe*, [1951] 1 All E.R. 767 in *Sinclair Welding Limited*. [1981] OLRB Rep. March 331, at paragraph 15.) A precondition of the application of estoppel is that “[t]here must have been an existing legal relationship between the parties at the time the statement on which the estoppel is found was made” (see *Fridman, The Law of Contract in Canada* (2d. ed., 1986), as recognized by the Divisional Court in *Canadian National Railway Co. et al. v. Beatty et al* (1981), 34 O.R. (2d) 385. That requirement is satisfied: the parties were bound by the ICI Agreement. The “representation” may take the form of “acquiescence or inaction” by the party alleged to be estopped (although in this case the Windsor Board claims that Mr. Boyle made an “active” representation to it), but regardless, it must be unambiguous.

35. We have already concluded that there was a gentlemen’s agreement between the Plumbers and the Windsor Board. The question now is whether the gentlemen’s agreement is of such a character that it satisfies the elements of the doctrine of estoppel. At no time did Mr. Boyle say that he would abandon his ICI rights and, more importantly, in the context of estoppel, he made it clear that he could enforce them when *he* believed the Board of Education had not lived up to the gentlemen’s agreement. The Board of Education’s witnesses agreed that Mr. Boyle never said he would abandon his ICI rights; they did say, however, that he agreed he would set them aside by not grieving that which he had a right to grieve. Mr. Boyle, of course, as representative of a local of the international union could not “abandon” the Plumbers’ ICI rights. Those rights operate by force of law and cannot be waived by a local bound by the ICI Agreement. Thus the real issue is how clear and unambiguous was Mr. Boyle’s statement that he would not grieve the occasional contracting out to non-union contractors. Mr. Boyle did indicate that he would “turn a blind eye” to some contracting out to non-union contractors. No witness for the Board of Education was able to state with any precision how many incidents of contracting out to non-union contractors would contravene the agreement, nor whether the size of the contracts was relevant. That determination was obviously left with Mr. Boyle. Although the representation made by Mr. Boyle with respect to the contracting out was clear, its meaning was fraught with ambiguity. Furthermore, although Mr. Pilotis testified that without that understanding, which he termed the “gentlemen’s agreement”, he would not have recommended signing the Maintenance Agreement, we conclude that the actual reason the Board of Education signed the Maintenance Agreement was its own



inclination to avoid the 1983 certification in order to apply its lowest tender policy and generally operate as it had done prior to the construction certification.

36. The evidence shows that the Board of Education was anxious to avoid the ramifications of the construction certification. For example, Mr. Pilotis admitted that the Windsor Board's solicitor told them that they had no right to make a maintenance agreement because the construction certificates were all-inclusive, but the officials thought that by agreeing to a maintenance agreement, Mr. Boyle had given the Board of Education a chance to bargain locally. He said that he understood that Mr. Boyle was concerned about the future of the four permanent employees and that he was prepared to sign a maintenance agreement in order to protect them; for their part, the Board of Education "wanted something out of it". His response to counsel for the Union's question, "something lawful?" was "not necessarily"; the Board of Education was concerned to protect its sub-contracting policy and it believed the construction agreement was gray in that area. He agreed that "it doesn't matter whether it's lawful or unlawful, [we'd] do it": "we wanted to address ... the job security of the employees, the Board [of Education]'s position with respect to contracting out -- we didn't address whether lawful or unlawful. We wanted to deal with these issues in a formal or informal way". The Trustee, Mr. Musson, explained that he understood that the Board of Education, after the 1983 certification, had a "contractors agreement" which was different than the way in which they had operated and that "we knew there was nothing we could do about that, but we didn't think we couldn't operate as we had previously operated despite a piece of paper". Unlike Mr. Pilotis, who was directly involved in negotiations, Mr. Musson insisted that the Board of Education "wouldn't knowingly enter into an unlawful agreement". He admitted that if the Board of Education were forced to operate as a contractor, "we'd probably fire the four [permanent] employees and contract out" and agreed that the Board of Education had in fact attempted to do just that and had been ordered to reinstate the plumbers. Mr. Musson summarized the benefits of the maintenance agreement as "quite significant", not because of financial savings, but because of labour peace and "operating as we had previously with more flexibility". Mr. Mickle said he did have an understanding that any construction work had to be done under the construction agreement when the Union has been certified under the construction industry provisions of the Act, but that "we don't see ourselves as a constructor". Furthermore, the Windsor Board's own representation about the extent to which it had contracted out to non-union contractors is not without its difficulty. The Minutes of the January 29, 1985 meeting indicated that E. Laub, for the Board of Education, said that "in the last four and a half years he does not think the Board has hired non-union plumbers but if they were hired it was because of an emergency situation". Robert Dureno, superintendent of business for the Windsor Board since 1977 or 1978, said that the Windsor Board had tendered out work during 1985 and testified that at the negotiations the Board of Education did not relate specific instances, but did say that there had been some non-union contracting out before in plumbing and the other trades, but did not suggest that was because of any emergency; he considered his and Mr. Laub's statement as consistent. The Windsor Board's main concern was that they be subject only to one agreement: a maintenance agreement gave them greater flexibility than the ICI Agreement. Indeed, both Mr. Pilotis and Mr. Mickle were of the opinion that an entirely new school could be constructed under the Maintenance Agreement, although clearly such activity would be defined as "construction".

37. We find that the only representations made by Mr. Boyle were that the Plumbers would not grieve the occasional contracting out to non-union contractors but that he would decide what constituted "isolated" instances of such contracting out and what constituted a "pattern". Regardless of whether those representations are sufficient to constitute the "clear and unambiguous" representations required for estoppel, we further find that the Board of Education's eagerness to avoid the ramifications of the ICI Agreement prompted them to accept Mr. Boyle's vague concession in return for the Maintenance Agreement, without ascertaining the exact terms of that conces-



sion, and in the full knowledge that Mr. Boyle could assert the Plumbers' rights at any time. Any detriment suffered by the Windsor Board stems from its own desire to avoid the ICI Agreement, rather than from specific reliance on representations made by Mr. Boyle. Therefore, we are not prepared to find that the elements of the doctrine of estoppel have been satisfied with respect to the "gentlemen's agreement" and contracting-out to non-union contractors. Both parties attempted to side-step around the inconveniences the construction certification had caused them, but that does not mean that the side-stepping of either party resulted from specific reliance on the statements or conduct of the other.

38. The Windsor Board also argues that the Maintenance Agreement estops the Union from grieving the failure to pay construction rates to the temporary plumbers. We have found that the Maintenance Agreement does not apply to the temporary plumbers. The Minutes of the negotiating meetings show that the issue was never discussed directly and therefore the Board of Education did not enter into the Maintenance Agreement on the understanding that it covered temporary plumbers; and if it did, it did not do so on the basis of any unambiguous representation to that effect by Mr. Boyle. The only possible representation made by Mr. Boyle, in reference to the construction rate on the referral slips, occurred after the Maintenance Agreement had been signed and the referrals had been made. Accordingly, the doctrine of estoppel does not apply with respect to the Maintenance Agreement and the rates to be paid to the temporary plumbers.

### The Grievances

39. We turn now to the specific grievances, dealing first with the wages grievance. The union referred three men to the Windsor Board during the period June to November 1985 and seven men from May or June to the date of the grievance (and beyond). Hiring hall referral slip no. 2521, dated June 3, 1985, shows that Michael Samson was referred by the Union to the Windsor Board as a steamfitter; referral slip no. 3110 shows that Tim Slote was referred on July 11, 1985 as a plumber and slip no. 3111 shows Casey Heeren was also referred on that date as a plumber and steamfitter. The 1985 slips indicate the base wage rate was to be \$18.97 plus benefits and deductions for them specifically listed. The rate on the 1985 slips is in accordance with the Provincial Agreement at the time. In 1986, Tim Slote, Michael Samson and Casey Heeren were referred by the Union to the Windsor Board; their referral slips, numbered 0586, 0587 and 0588 and dated May 12, 1986, showed the rate of pay as \$18.75, the ICI rate, with the construction benefits specified. Subsequently, a second slip, no. 0595, also dated May 12, 1986, was made out for Casey Heeren; it showed the rate as \$17.08 and the words "Plus Benefits". The second slip was made out, according to Mr. Boyle, because a representative of the Windsor Board had called and informed the hiring hall that the temporary plumbers would be working on maintenance within a day or two of starting. Second slips, numbered 0596 and 0597, with the maintenance rate and the words "Plus Benefits" were made out for Mr. Slote and Mr. Samson, as well; although all the second slips would have been made out May 13th or 14th, they were backdated to coincide with the effective dates of commencement of work. Referral slips, all but one dated June 16, 1986, for four other plumbers, Tracey Ringrose (no. 0632), James Crabb (no. 0622), Jerry Whaling (no. 0624), Stephen Samson (no. 0621) and Charlie Ridley (no. 4451, dated July 7, 1986) show a \$17.08 base rate, the phrase "Plus Benefits" and, in addition, the words "Construction Rate where applicable". (None of those four men are the subject of any grievance before us.) According to Mr. Boyle, the use of these words was meant to permit the temporary plumbers and fitters to work under either agreement, depending on the work being performed. If construction work were being done, the ICI rate would be paid. The rate on the 1986 slips is the maintenance rate pursuant to the Maintenance Agreement.

40. The temporary plumbers hired in 1985 did not receive the ICI rate, however. Michael

Samson testified that he complained about the rate of pay in 1985 to Mr. Lawrenson and that the discrepancy in pay was obvious by the third week of work. Mr. Lawrenson acknowledged he knew about the concern, and included the ICI rate in his calculation of the cost of the projects. The benefits posed no problem since "they checked out with the benefits in the ICI agreement". (As we indicate below, however, Mr. Boyle's emphasis with respect to the 1985 referrals was on benefits.) Mr. Lawrenson said that it was not his responsibility and that Mr. Boyle and the Board of Education personnel would resolve the problem. In calculating his budget for the summer projects, however, Mr. Lawrenson did take into account the construction rate. Mr. Samson also brought it to Mr. Boyle's attention. Mr. Samson said that he was satisfied the matter would be taken care of and that there would be some settlement in the future, but he never did receive the differential between the ICI rate and the maintenance rate. Again in 1986, Mr. Samson was referred to the Board of Education and again, he complained to Mr. Boyle about his wages, but did not make a formal complaint to the Board of Education. He agreed that he knew he would be paid \$17.08 an hour in 1986, but explained that he also knew that there had been no settlement between the union and the Windsor Board (that is, of the renewal of the Maintenance Agreement). He said that he agreed to payment at \$17.08 with the Board of Education with the understanding that there would be a pay adjustment at the ICI rate; that understanding was with Mr. Boyle, however, not with the Board of Education. (Mr. Samson replaced a permanent plumber between June 3, 1985 and July 28, 1985 and reported to the maintenance office during that period.)

41. Although there was dispute over who called whom, we find that Mr. Mickle called Mr. Boyle in May 1985 on the instruction of Mr. Piliotis in order to correct what they saw to be an error in rates on the referral slips. During the telephone call with Mr. Mickle in May 1985 (to which we refer below), it appears that Mr. Boyle agreed that the Maintenance Agreement covered the temporary plumbers because they were doing maintenance work. He believed, however, that if the temporary plumbers were covered by the Maintenance Agreement, they would receive the same benefits as the permanent plumbers. In fact, they were not entitled to vacation pay or cumulative sick leave and the Windsor Board was not prepared to pay the Union the difference, as Mr. Boyle understood it would. No further contact took place on this issue until, during the first meeting for the 1986 renewal negotiations for the Maintenance Agreement, held on April 7, 1986, Mr. Boyle raised the benefit monies still outstanding with respect to the temporary employees. He said that he was looking at the treatment of the temporary plumbers in the future. But there is nothing to suggest that this discussion would relate to construction work performed by the temporary plumbers and indeed, the Board of Education's Minutes state as follows: "G.Boyle indicated that they are prepared to discuss the benefits of temporary summer employees [in terms of maintenance work] and have it included in the agreement" (square brackets in the original). On April 7th, Mr. Boyle did not dispute that the temporary plumbers were doing maintenance work. By the next meeting, a week later, however, he indicated that the Union, after discussing the matter with its lawyer, considered the work done by the temporary plumbers in 1985 to be construction work. Mr. Mickle said that it was "evident" during the negotiations that Mr. Boyle thought the temporary plumbers should receive the construction rate. We are satisfied that the claim being made by Mr. Boyle related to the benefits received by the temporary plumbers and not the wage rate; we are satisfied that he accepted, until receiving legal advice in the spring of 1986, that they were doing maintenance work. Mr. Boyle expected that the pay discrepancy would be resolved in the course of the renewal negotiations. (The Maintenance Agreement had still not been renewed as of the date of hearing.) When the matter was not corrected as he had anticipated, he prepared the grievance for delivery on September 3, 1986.

42. With respect to the contracting out grievance, Mr. Boyle testified that the union does not have bargaining rights or a collective agreement with Dalla Bona Construction, Fregonese



Construction or Roko Construction, the three contractors to whom the work at these schools was contracted out by the Board of Education.

43. (Mr. Boyle had already become concerned about the Board of Education's contracting out to non-union contractors when he raised the contracting out of work to Cardinal Construction, a non-union contractor, at the May 23, 1986 negotiating meeting. That work was not within the Plumbers jurisdiction, however, and nothing more was made of it.) The Board of Education first heard about the Union's concern with its contracting out Plumbers' work to non-union contractors around the middle of 1986 when Mr. Boyle telephoned Mr. Dureno, saying that he had heard that there was a subcontract at Riverside High School. Mr. Dureno replied that the parties had agreed when they signed the Maintenance Agreement that that could happen but that surely this was an isolated case. Mr. Dureno could not understand why Mr. Boyle was excited about it; he said Mr. Boyle seemed to have a "vague memory" of the gentlemen's agreement and denied its existence. Mr. Dureno said Mr. Boyle did not get back to him with respect to Riverside. Mr. Dureno was unable to confirm whether the contractor at Riverside was union or non-union. The Windsor Board never knew whether it was contracting out to union or non-union contractors, it was simply satisfied that it did not seem to have to worry about that. Nevertheless, Mr. Dureno believes Dalla Bona and Roko Construction use union workers. Although Mr. Boyle's "vague memory" of various matters was in ample evidence at the hearing, we prefer Mr. Boyle's evidence over that of Mr. Dureno on this particular point. He testified that the Plumbers do not have an agreement with Dalla Bona, Roko Construction or Fregonese Construction.

44. We are satisfied that the work being done on the above projects was construction work and that the Board of Education contracted out the work to non-union contractors in violation of Article 11 of the ICI Agreement when it contracted the projects to the above-named contractors.

#### **Whether the Wage Grievance is Timely**

45. The Windsor Board argues that we should dismiss the wage rate grievance on the basis of delay. Although counsel referred to the time limits for filing a grievance set out in the Provincial Agreement, the Board of Education's submissions were directed at the doctrine of laches, the equitable doctrine of delay. The Board has the power to relieve a party's failure to grieve in conformity with the time limits set out in the collective agreement pursuant to subsection 124(1) and subsection 44(6) of the Act; the Board also has the authority to refuse to hear a complaint which it considers to be untimely. In both cases, it will consider the nature of the complaint, the reasons for the delay and the prejudice, if any, to the respondent if the complaint is entertained. Taking account of these factors, we are of the view that to the extent the grievance relates to the 1985 referrals, it is untimely: Mr. Boyle was in a position to know, if he did not actually know, in May 1985 that the temporary plumbers were not receiving the construction rate although they were doing construction work; his complaints to the Windsor Board centred on the benefits received by the temporary plumbers until the second or third negotiating meeting in 1986. When he did deliver the grievance to the Windsor Board in September 1986, some sixteen months later, shortly after a meeting between the parties and a conciliation officer on August 27, 1986, the grievance dealt with a failure to pay the construction rate and benefits. (A letter dated September 10, 1986, states that the Minister has decided not to appoint a Board of Conciliation.) Mr. Boyle explained that delay in filing a grievance over the 1985 referrals as resulting from a lack of money: the union had just spent \$28,000 in the certification proceedings and in illegal lockout proceedings and with only 375 members, it does not "have a blank cheque to go to litigation". He thought the matter could be resolved without going to litigation and filed a grievance only when he realized at the end of the summer in 1986 that it would not be resolved. While the 1986 events raise some of the same issues, the basis of complaint about the 1985 referrals was not set out clearly until the grievance was deliv-



ered, while the Board of Education was put on notice in the spring of 1986 that the Plumbers expected construction rates for construction work in May and June 1986; furthermore, we are satisfied that the time lapse between the 1986 referrals and the delivering of the grievance in September 1986, does not raise the same concern as the gap between the 1985 referrals and the filing of the grievance. Accordingly, the grievance in File No. 2182-86-M is dismissed insofar as it relates to the 1985 referrals.

### **Declarations and Orders**

46. Accordingly, we hereby declare that the Board of Education is bound by the Collective Agreement between the Mechanical Contractors Association of Ontario and the Ontario Pipe Trades Council effective from May 1, 1984 until April 30, 1986 and May 1, 1986 until April 30, 1988.

47. We further declare that \$17,150.90 (constituting the difference between the maintenance rate and the construction rate applying with respect to the temporary plumbers in 1986) and \$467.15 (vacation pay with respect to the temporary plumbers in 1986) is owing by the Board of Education to the Plumbers and direct that the Board of Education pay forthwith to the Plumbers the sum of \$17,618.05.

48. We further declare that the Board of Education has violated Article 11 of the Provincial Agreement. We remain seized with respect to remedy in the contracting out grievance and to any difficulties with respect to the remedy in the wages grievance.

### **DECISION OF BOARD MEMBER R. M. SLOAN;**

1. I must respectfully dissent from the decision of the majority for reasons noted below.

2. The Ontario Labour Relations Board (The Board) in File no. 1791-82-R certified the applicant under the construction provisions of the *Labour Relations Act* (The Act) as bargaining agent for "... all plumbers and plumbers' apprentices in the employ of the Board of Education for the City of Windsor -

I. "... in the industrial, commercial and institutional sector *of the construction industry*..." and;

II. "... excluding the industrial, commercial and institutional sector."  
[emphasis added]

3. I believe that it is significant to note here that the certificates covered *all* relevant employees without distinction as to whether they are regular (full-time); temporary (part-time); casual; or hired for summer projects work. In fact certificates issued by the Board in construction certifications do not allow for any such distinctions.

4. It is clear from the evidence that following certification both parties proceeded to operate under the terms of the Provincial Agreement until the applicant requested, in a persistent manner, that the respondent negotiate a maintenance agreement. Not, it should be noted because of a change in job functions, but to enable the bargaining unit members to participate in the superior benefits plan enjoyed by other trades employed by the Board of Education under similar maintenance collective agreements.

5. The Board of Education, with some misgivings as to the legality of such a move, negoti-

ated and signed the Maintenance Agreement on March 17, 1985. A significant aspect of the negotiations for this maintenance agreement was the agreement by the applicant to abrogate its rights under the Provincial Agreement and permit the Board of Education to award contracts to lowest bidders without regard to the fact that the contractor was unionized or not, provided the respondent did not make a habit of the practice or that the awarding of such contracts did not form a pattern. This agreement is known as the "Gentlemen's Agreement". The evidence is clear that such an arrangement was entered into, and it is equally clear that the number of instances where the respondent is alleged to have awarded contracts to non-union contractors do not constitute a "habit" or "pattern".

6. I agree with the majority decision that the parties breached section 146(2) of the Act but I do not limit the instrument of such breach to the Gentlemen's Agreement but I find that the Maintenance Agreement and the Gentlemen's Agreement which are inextricably linked are in contravention of section 146(2) being a "...collective agreement or other arrangement that does not comply with subsection (1)" and it therefore follows that the Maintenance Agreement is null and void.

7. I would dismiss the grievances for wages and benefits on the basis that they are untimely. The explanation given by the applicant for the delay in filing the 1985 claims is found to be unacceptable to the majority and I would so find for the 1986 claims.

8. With respect to the awarding of contracts to non-union contractors I would also support the respondent's position that in view of the applicant's clear and unequivocal agreement to forego its rights, a decision it assured the Board of Education that it had the right to make, it is now estopped from attempting to seek a remedy.

9. Finally I would, in the interests of getting the parties to enter into their future relationships in a positive manner I would order that they commence operating under the ICI Provincial Agreement, effective the date of this decision, with neither party being penalized for past conduct related to the two files in question.

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# APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING FEBRUARY 1988

## APPLICATIONS FOR CERTIFICATION

### Bargaining Agents Certified Without Vote

**1330-86-R:** Sheet Metal Workers' International Association, Local 47 (Applicant) v. M & AL Roofing Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all roofers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (32 employees in unit)

**0101-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Genspec Construction Incorporated (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

**1340-87-R:** Millwright District Council of Ontario, United Brotherhood of Carpenters & Joiners of America, on behalf of Locals 1007, 1151, 1244, 1410, 1425, 1592, 1916 & 2309 (Applicant) v. Arne Kleppe, c.o.b. as Lydar Enterprises (Respondent) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Intervener)

Unit: "all millwrights and millwrights' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all millwrights and millwrights' apprentices in the employ of the respondent in all other sectors in the District of Sudbury, including (but not limited to) that area within a radius of 57 kilometres (approximately 35 miles) of the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) (*Having regard to the agreement of the parties*)

**1342-87-R:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Applicant) v. Arne Kleppe, c.o.b. as Lydar Enterprises (Respondent)

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all ironworkers and ironworkers' apprentices in the employ of the respondent in all other sectors in the District of Sudbury, including (but not limited to) that area within a radius of 57 kilometres (approximately 35 miles) of the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) (*Having regard to the agreement of the parties*)

**1621-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. R. G. Kirby Construction Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commer-

cial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit) (*Having regard to the agreement of the parties*)

**1861-87-R:** Canadian Union of Public Employees (Applicant) v. The Children's Aid Society for the County of Essex (Respondent)

Unit #1: "all social workers and child care workers employed by the respondent in the County of Essex, save and except unit managers, persons above the rank of unit manager, after hour workers, persons regularly employed for not more than 24 hours per week and students employed on a co-operative program" (31 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all office, clerical and maintenance employees of the respondent in the County of Essex, save and except supervisor, secretary to the Director of Finance and bookkeeping supervisor, secretary to the Executive Director and Assistant Executive Director, secretary to Legal Services and students employed on a co-operative program or government grant" (9 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**1869-87-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Volcano Inc. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors within a radius of 81 kilometres (approximately 50 miles) of the Timmins Federal Building, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**1903-87-R:** United Steelworkers of America (Applicant) v. Rowika Industries Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Midland, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period" (28 employees in unit) (*Having regard to the agreement of the parties*)

**2028-87-R:** Labourers' International Union of North America, Local 607 (Applicant) v. N-A Construction Ltd., c.o.b. as P & G Construction Co. (Respondent) v. Lumber & Sawmill Workers' Union, Local 2693, of the United Brotherhood of Carpenters & Joiners of America (Intervener)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

**2041-87-R:** Labourers' International Union of North America, Local 506 (Applicant) v. The Atlas Corporation (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

**2054-87-R:** Service Employees Union, Local 219 (Applicant) v. Brumical Investments Limited (Respondent) v. Group of Employees (Objectors)

Unit #1: (see *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*)

Unit #2: “all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, and office and sales staff” (Number of employees in unit unavailable)

**2108-87-R; 2109-87-R:** United Brotherhood of Carpenters & Joiners of America - Drywall, Acoustic, Lathing & Insulation, Local 675 (Applicant) v. Phoenix Drywall & Acoustics Ltd., and 723303 Ontario Ltd. c.o.b. as Phoenix Drywall (Respondents) v. Group of Employees (Objectors)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham” (12 employees in unit)

**2172-87-R:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Lundrigans Construction Ltd. (Respondent)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

**2175-87-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. York Condominium Corporation #385 (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent engaged in cleaning and maintenance at 2645 Jane Street in the Municipality of Metropolitan Toronto, including resident superintendents, save and except property manager, persons above the rank of property manager, and students employed during the school vacation period” (5 employees in unit)

**2312-87-R:** Service Employees International Union, Local 204, S.E.I.U., AFL:CIO:CLC (Applicant) v. Community Services to Jewish Elderly, c.o.b. as Senior Care (Respondent)

Unit #1: “all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (95 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: (see *Bargaining Agents Certified Subsequent to a Post-hearing Vote*)

**2428-87-R:** International Brotherhood of Painters and Allied Trades, Local 205 (Applicant) v. Spree Painting Contractors Inc. (Respondent)

Unit: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters’ apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Waterloo and the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Township of Nassagaweya, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

**2456-87-R:** Canadian Union of Operating Engineers & General Workers, Local 793 (Applicant) v. Northern Excavations, division of Lavern Construction Ltd. (Respondent)



Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors within a radius of 81 kilometres (approximately 50 miles) of the Timmins Federal Building engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

**2525-87-R:** London & District Service Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Applicant) v. Winston Hall Nursing Homes Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all nursing home employees of the respondent in the City of Kitchener, save and except supervisors, persons above the rank of supervisor, graduate and registered nurses, office and clerical staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (47 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: (see *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*)

**2548-87-R:** Alliance des Administrateurs et Educateurs de la Toronto French School (Applicant) v. The Toronto French School (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except Supervisor of the Childcare Department, Accountant, Benefits Manager, Director of Services, Registrar, Acting Director of Mississauga Branch, Secretary-Treasurer, Principals, Director of Studies, Headmaster, and persons above the rank of those exceptions indicated herein, Secretary to the Headmaster, Secretary to the Secretary-Treasurer, maintenance and caretaking employees, employees regularly employed for not more than 11 hours per week and employees in bargaining units for which any trade union held bargaining rights as of December 11, 1987" (35 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**2608-87-R:** Service Employees' International Union, Local 478 (Applicant) v. The Sisters of St. Joseph of Sault Ste. Marie, c.o.b. as St. Joseph's Motherhouse (Respondent)

Unit: "all employees of the respondent in the City of North Bay regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office staff and employees in bargaining units for which any trade union held bargaining rights as of December 17, 1987" (15 employees in unit) (*Having regard to the agreement of the parties*)

**2609-87-R:** Labourers' International Union of North America, Local 506 (Applicant) v. Tactix Construction Ltd. (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 27 (Intervener)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (19 employees in unit)

**2610-87-R:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 27 (Applicant) v. Tactix Construction Ltd. (Respondent) v. Labourers' International Union of North America, Local 506 (Intervener)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of

Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

**2637-87-R:** The Association of General Studies Teachers in Hebrew Day Schools (Applicant) v. The Associated Hebrew Schools of Toronto (Respondent)

Unit: "all teaching assistants employed in general studies by the respondent in the Municipality of Metropolitan Toronto and the Region of York" (12 employees in unit) (*Having regard to the agreement of the parties*)

**2677-87-R:** Service Employees' International Union, Local 532, S.E.I.U., AFL:CIO:CLC (Applicant) v. McMaster University (Respondent)

Unit: "all employees of the respondent in its Food Services Division, on its present campus in the City of Hamilton, regularly employed for not more than 24 hours per week, save and except Chefs, Assistant Managers and Supervisors, office staff, Head Baker, persons hired under a rehabilitation program, and employees in bargaining units for which any trade union held bargaining rights as of December 23, 1987" (34 employees in unit) (*Having regard to the agreement of the parties*)

**2683-87-R:** Sheet Metal Workers' International Association, Local 47 (Applicant) v. Flakt Canada Ltd. (Respondent)

Unit: "all employees of the respondent at its equipment division in the Town of Smith Falls, save and except foreman, persons above the rank of foreman, office and sales staff" (6 employees in unit) (*Having regard to the agreement of the parties*)

**2710-87-R:** United Steelworkers of America (Applicant) v. Canadian Feed Screws Mfg. Ltd. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (49 employees in unit) (*Having regard to the agreement of the parties*)

**2723-87-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Karvon Construction Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**2758-87-R:** United Steelworkers of America (Applicant) v. Tann Canada Limited (Respondent)

Unit: "all employees of the respondent in the Town of Milton, save and except foremen, persons above the rank of foreman, office and sales staff" (17 employees in unit) (*Having regard to the agreement of the parties*)

**2760-87-R:** Energy & Chemical Workers Union (Applicant) v. Maple Leaf Mills Ltd., c.o.b. as Rothsay (Respondent)

Unit: "all employees of the respondent working at or out of the Town of Paris, save and except foremen, persons above the rank of foreman, office and sales staff" (19 employees in unit) (*Having regard to the agreement of the parties*)

**2761-87-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. H P Automated Processes Ltd. (Respondent)

Unit: "all employees of the respondent in the City of St. Catharines, save and except forepersons, persons above the rank of foreperson, office, technical and sales staff" (46 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)



**2766-87-R:** International Brotherhood of Painters & Allied Trades, Local 1824 (Applicant) v. Ford Glass Center (Respondent)

Unit: "all glaziers and glaziers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all glaziers and glaziers' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

**2767-87-R:** Canadian Union of Public Employees (Applicant) v. Port Hope & District Hospital (Respondent)

Unit: "all office and clerical employees of the respondent in Port Hope regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, and employees in bargaining units for which any trade union held bargaining rights as of January 11, 1988" (12 employees in unit) (*Having regard to the agreement of the parties*)

**2772-87-R:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 834 (Applicant) v. Crips-Atlas Ltd. (Respondent)

Unit: "all employees of the respondent working at or out of the Townships of Sandwich South, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and employees in bargaining units for which any trade union held bargaining rights as of January 28, 1988" (6 employees in unit) (*Having regard to the agreement of the parties*)

**2814-87-R:** Graphic Communications International Union, Local 500M (Applicant) v. Globe Graphic Communications Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (24 employees in unit) (*Having regard to the agreement of the parties*)

**2823-87-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Swindell Dressler Corporation of Canada Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman" (16 employees in unit)

**2836-87-R:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 27 (Applicant) v. IPCF Properties Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**2851-87-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. IPCF Construction, division of IPCF Properties Inc. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Mun-



icipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

**2854-87-R:** Service Employees’ International Union, Local 204, S.E.I.U., AFL:CIO:CLC (Applicant) v. A Circle of Children Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in Metropolitan Toronto, save and except program manager and persons above the rank of program manager” (10 employees in unit) (*Having regard to the agreement of the parties*)

**2855-87-R:** Service Employees’ International Union, Local 204, S.E.I.U., AFL:CIO:CLC (Applicant) v. The Toronto Aged Men’s and Women’s Homes (Respondent) v. Group of Employees (Objectors)

Unit #1: “all employees of the respondent in Metropolitan Toronto, save and except registered, graduate and undergraduate nurses, paramedical employees, supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (46 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: “all employees of the respondent in Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except registered, graduate and undergraduate nurses, paramedical employees, supervisors, persons above the rank of supervisor, office and clerical staff” (3 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**2873-87-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. Labour Council Development Foundation (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 27 (Intervener)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

**2874-87-R:** Labourers’ International Union of North America, Local 506 (Applicant) v. Greenspoon Bros. Ltd. (Respondent)

Unit: “all employees of the respondent in the Town of Markham, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff and construction employees” (5 employees in unit) (*Having regard to the agreement of the parties*)

**2883-87-R:** Teamsters Local No. 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. FIBRACAN, division of Innopac Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the City of Mississauga, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of ” (55 employees in unit) (*Having regard to the agreement of the parties*)

**2979-87-R:** International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Broneff Contractors Inc. (Respondent)

Unit: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and

institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit) (*Clarity Note*)

**2980-87-R:** International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. 723303 Ontario Ltd., c.o.b. as Phoenix Drywall (Respondent)

Unit: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit) (*Clarity Note*)

**3012-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. E. A. Mordini General Contractor (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

### **Bargaining Agents Certified Subsequent to a Pre-Hearing Vote**

**0726-87-R:** Ontario Secondary School Teachers' Federation (Applicant) v. The Frontenac County Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its secondary panel in the County of Frontenac, save and except employees in bargaining units for which any trade union held bargaining rights as of June 10, 1987" (103 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	103
Number of persons who cast ballots	33
Number of ballots marked in favour of applicant	29
Number of ballots marked against applicant	4

**2542-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 1030 (Applicant) v. Nestreb Inc. (Respondent) v. Labourers' International Union of North America, Local 247 (Intervener)

Unit: "all employees of the respondent in the Township of Kingston, save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	15
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	0

### Bargaining Agents Certified Subsequent to a Post-Hearing Vote

**0736-87-R:** Ontario Secondary School Teachers' Federation (Applicant) v. Wellington County Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its secondary panel in Wellington County, save and except employees in bargaining units for which any trade union held bargaining rights as of June 11, 1987" (43 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	143
Number of persons who cast ballots	32
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	30
Number of ballots marked in favour of applicant	24
Number of ballots marked against applicant	6
Ballots segregated and not counted	2

**1653-87-R:** Ontario Secondary School Teachers' Federation (Applicant) v. The Dryden Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its secondary panel in the District of Kenora" (51 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	51
Number of persons who cast ballots	14
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	12
Number of segregated ballots cast by persons whose names appear on voters' list	2
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	2
Ballots segregated and not counted	1

**1654-87-R:** Ontario Secondary School Teachers' Federation (Applicant) v. The Peterborough County Board of Education (Respondent)

L Unit: "all occasional teachers of the respondent in its secondary panel in the County of Peterborough" (34 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	134
Number of persons who cast ballots	22
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	20
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	2
Ballots segregated and not counted	2

**2236-87-R:** International Brotherhood of Electrical Workers, Local 2228 (Applicant) v. Corporation of the Town of Rockland (Respondent) v. Canadian Union of Public Employees, Local 2292 (Intervener)

Unit: "all employees of the respondent in the Town of Rockland, save and except office staff, including Day Care Centre and Municipal Library, foremen, persons above the rank of foreman, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (9 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	9
Number of persons who cast ballots	9
Number of ballots marked in favour of applicant	9
Number of ballots marked in favour of intervener	0



**2312-87-R:** Service Employees' International Union, Local 204, S.E.I.U., AFL:CIO:CLC (Applicant) v. Community Services to Jewish Elderly, c.o.b. as Senior Care (Respondent)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: "all employees of the respondent in Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, and office and clerical staff" (28 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	28
Number of persons who cast ballots	9
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	0

**2450-87-R:** Ontario Secondary School Teachers' Federation (Applicant) v. The Board of Education for the City of North York (Respondent) v. Association of Professional Student Services Personnel (Intervener #1) v. Canadian Union of Public Employees (Intervener #2)

Unit: "all employees of the respondent in the City of North York employed as psychologists, psycho-educational consultants, alternatives counsellors, multi-cultural consultants, speech therapists and social workers, save and except supervisors and persons above the rank of supervisor" (59 employees in unit)

Number of names of persons on list as originally prepared by employer	59
Number of persons who cast ballots	39
Number of ballots marked in favour of applicant	28
Number of ballots marked in favour of intervener #1	11

**2451-87-R:** Ontario Secondary School Teachers' Federation (Applicant) v. The Board of Education for the City of York (Respondent) v. Association of Professional Student Services Personnel (Intervener #1) v. Canadian Union of Public Employees (Intervener #2)

Unit: "all psychologists, psycho-educational consultants, social workers and attendance counsellors employed by the respondent in the City of York, save and except senior psychologists, senior social workers, persons above the rank of senior psychologists and senior social workers and persons regularly employed for not more than 24 hours per week" (9 employees in unit)

Number of names of persons on list as originally prepared by employer	9
Number of persons who cast ballots	9
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	7
Number of ballots marked in favour of applicant	7
Number of ballots marked in favour of intervener #1	0
Ballots segregated and not counted	2

**2464-87-R:** Alliance Employees' Union (Applicant) v. Union of National Defence Employees (Respondent) v. Staff Officers Union (Intervener)

Unit: "all employees of the respondent, save and except the executive secretary, the research director, the research secretary, and those employees covered by the collective agreement between the respondent and the Office and Professional Employees' International Union, Local 225" (9 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	9
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	6
Number of ballots marked in favour of intervener	0

### Applications for Certification Dismissed Without Vote

**2914-86-R:** Labourers' International Union of North America, Local 837 (Applicant) v. Dagmar Construction Ltd. (Respondent) (19 employees in unit)

**1434-87-R:** International Brotherhood of Electrical Workers, Local 2228 (Applicant) v. Rockland Hydro - Electric Commission/Commission Hydro - Electric de Rockland (Respondent) (2 employees in unit)

**2565-87-R:** Ontario Catholic Occasional Teachers' Association (Applicant) v. Frontenac-Lennox & Addington County Roman Catholic Separate School Board (Respondent) (87 employees in unit)

**2759-87-R:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Colonial Furniture Company (Ottawa) Ltd. (Respondent) (Number of employees in unit unavailable)

**2813-87-R:** Aluminum, Brick & Glass Workers International Union, AFL:CIO:CLC (Applicant) v. National Business Systems (Respondent) v. Group of Employees (Objectors) (79 employees in unit)

### Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

**2469-87-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Novatronics of Canada Ltd. (Respondent) v. International Brotherhood of Electrical Workers, Local 2345 (Intervener)

Unit: "all employees of the respondent in Mount Forest, save and except foremen, persons above the rank of foreman, office, clerical and sales staff" (60 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	60
Number of persons who cast ballots	58
Number of ballots marked in favour of applicant	29
Number of ballots marked in favour of intervener	29

### Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

**1139-87-R:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. 714018 Ontario Ltd., c.o.b. as Executive Taxi & Limousine (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Brockville, save and except manager and persons above the rank of manager, office staff and dispatchers" (15 employees in unit)

Number of names of persons on list as originally prepared by employer	15
Number of persons who cast ballots	14
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	14

**1962-87-R:** Ontario Liquor Board Employees' Union (Applicant) v. Blue Water Bridge Duty Free Shop Inc. (Respondent)

Unit: "all employees of the respondent in the Village of Point Edward, save and except manager, persons above the rank of manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (9 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	9

**2054-87-R:** Service Employees' International Union, Local 219 (Applicant) v. Brumical Investments Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent in Ottawa, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	15
Number of persons who cast ballots	11
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	9

Unit #2: (see *Bargaining Agents Certified Without Vote*)

**2209-87-R:** Ontario Secondary School Teachers' Federation (Applicant) v. 548495 Ontario Ltd., c.o.b. as The Kingston Learning Centre (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent employed as teachers working out of the respondent's offices in Kingston in the penal system, save and except head teachers and educational consultants, and persons above the rank of head teacher and educational consultants" (34 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	34
Number of persons who cast ballots	32
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	18

**2330-87-R:** Christian Labour Association of Canada (Applicant) v. I.O.O.F. Senior Citizens Home Inc. (Respondent)

Unit: "all employees of the respondent in the City of Barrie regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, Director of Activities, registered and graduate nurses and office staff" (24 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	24
Number of persons who cast ballots	17
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	16
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	10
Ballots segregated and not counted	1

**2408-87-R:** Hotel, Motel & Restaurant Employees Union, Local 442, AFL:CIO:CLC (Applicant) v. Woodstream Corporation (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Niagara Falls, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (63 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	63
Number of persons who cast ballots	61
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	60
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of ballots marked in favour of applicant	24
Number of ballots marked against applicant	36
Ballots segregated and not counted	1



**2412-87-R:** United Food & Commercial Workers International Union, Local 175 (Applicant) v. Humpty Dumpty Foods Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Burlington, save and except supervisors, persons above the rank of supervisor, office and clerical staff, and students employed during the school vacation period" (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	15
Number of persons who cast ballots	15
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	15

**2525-87-R:** London & District Service Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Applicant) v. Winston Hall Nursing Homes Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week in the City of Kitchener, save and except supervisors, persons above the rank of supervisor, graduate and registered nurses, office and sales staff" (11 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	11
Number of persons who cast ballots	10
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	6

### Applications for Certification Withdrawn

**1154-87-R:** Algoma Steel Front-Line Foremen Association (Applicant) v. The Algoma Steel Corporation Ltd. (Respondent) v. United Steelworkers of America, Locals 2251, 4509, 5595, 2251 (Sault Marine Services Ltd., Local 2288) (Intervener)

**1754-87-R:** Teamsters Local No. 91, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Armoured Transport of Canada Ltd. (Respondent)

**1771-87-R:** Teamsters Local No. 419, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Steinberg Inc. (Miracle Food Mart Division) (Respondent)

**2211-87-R:** Labourers' International Union of North America, Local 607 (Applicant) v. Castonguay Blasting Ltd. (Respondent)

**2356-87-R; 2357-87-R:** United Steelworkers of America (Applicant) v. Angler's Cove Restaurant (Respondent)

**2429-87-R:** Labourers' International Union of North America, Local 1081 (Applicant) v. Capital Paving (Respondent)

**2623-87-R:** Gaston Jolie (Applicant) v. United Transportation Union (Respondent) v. Corporation of the City of Sault Ste. Marie (Intervener)

**2672-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Tasis Contracting Ltd. (Respondent)

**2700-87-R:** Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. CN Hotels Inc., c.o.b. as L'Hotel (Respondent) v. Canadian Brotherhood of Railway, Transport & General Workers (Intervener)

**2715-87-R:** United Food & Commercial Workers International Union (Applicant) v. Sarnia Beverages (Respondent)

**2757-87-R:** United Steelworkers of America (Applicant) v. Mitsubishi Electric Sales Inc. (Mitsubishi Corporate Service Division) (Respondent)

**2776-87-R:** Ontario Nurses' Association (Applicant) v. The Regional Municipality of Hamilton-Wentworth (Respondent) v. Canadian Union of Public Employees (Intervener)

**2795-87-R:** Canadian Union of Public Employees (Applicant) v. COSTI-IIAS (Respondent)

**2846-87-R:** United Food & Commercial Workers International Union, Local 459 (Applicant) v. Omstead Foods Ltd. (Respondent)

**2964-87-R:** International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Landford Construction Ltd., c.o.b. as Diamond Drywall (Respondent)

**3013-87-R:** Labourers' International Union of North America, Local 527 (Applicant) v. New Look Restoration Ottawa Ltd. (Respondent)

## APPLICATIONS FOR FIRST CONTRACT ARBITRATION

**2349-87-FC:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), Local 252 (Applicant) v. Caterpillar of Canada Ltd. (Respondent) (*Withdrawn*)

**2799-87-FC:** Service Employees' International Union, Local 210, S.E.I.U., AFL:CIO:CLC (Applicant) v. Salvation Army Men's Social Service Centre (Respondent) (*Withdrawn*)

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**1055-87-R:** International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. Elteck Electrical Contracting Ltd., Algoma North Electronics Ltd., J.D. Olsen Contracting Ltd. (Respondents) (*Withdrawn*)

**1541-87-R:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787 (Applicant) v. Venture Mechanical Contractors Inc., F.C. Engineering Ltd. and Vari-Therm Ltd. (Respondents) (*Granted*)

**1747-87-R:** Labourers' International Union of North America, Local 1081, and International Union of Bricklayers & Allied Craftsmen, Local 12 (Applicants) v. Armor Masonry & Precast Ltd., and Reinhardt Masonry Ltd. (Respondents) (*Withdrawn*)

**1840-87-R:** Ontario Council of the International Brotherhood of Painters & Allied Trades, Local 200 (Applicant) v. Bob Cinkant Painting Ltd., M & S Contracting Services Ltd., Cinkant Contracting Services Ltd. (Respondents) (*Granted*)

**2274-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Sibbo Inc., and 152583 Canada Inc. c.o.b. as Maxibo Inc. (Respondents) (*Granted*)

**2278-87-R:** International Beverage Dispensers' & Bartenders' Union of Hotel & Restaurant Employees' & Bartenders' International Union, Local 2380 (Applicant) v. 572379 Ontario Ltd., Kanata Hotels Inc., and Sidsamhar Investments Ltd. (Respondents) (*Granted*)

**2436-87-R:** Sheet Metal Workers' International Association, Local 30 (Applicant) v. Maxim Group General Contracting Ltd., and Rainscreen Metal Systems Inc. (Respondents) v. Operative Plasterers' & Cement Masons' International Association of the United States & Canada, Local 172 - Restoration Steeplejacks (Intervener) v. Group of Employees (Objectors) (*Withdrawn*)

**2480-87-R; 2481-87-R:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. The Maintenance & Construction Department, and the Design Services Department, of the Board of Education for the City of Toronto (Respondent) v. United Steelworkers of America (Intervener #1) v. International Association of Machinists & Aerospace Workers, Local 235 (Intervener #2) v. Canadian Union of Public Employees (Intervener #3) (*Withdrawn*)

**2707-87-R:** Labourers' International Union of North America, Local 506 (Applicant) v. Tactix Construction Ltd., Jilsen Investments Inc. (Respondents) (*Withdrawn*)

**2778-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Shea Construction & Canro Contracting Ltd. (Respondent) (*Withdrawn*)

**2815-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Tactix Construction Limited, and Jilsen Construction Inc. (Respondents) (*Withdrawn*)

**2892-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. IPCF Properties Inc. (Respondent) (*Withdrawn*)

## SALE OF A BUSINESS

**1055-87-R:** International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. Elteck Electrical Contracting Ltd., Algoma North Electronics Ltd., and J.D. Olsen Contracting Ltd. (Respondents) (*Withdrawn*)

**1541-87-R:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787 (Applicant) v. Venture Mechanical Contractors Inc., F.C. Engineering Ltd., and Vari-Therm Ltd. (Respondents) (*Granted*)

**1747-87-R:** Labourers' International Union of North America, Local 1081, and International Union of Bricklayers & Allied Craftsmen, Local 12 (Applicants) v. Armor Masonry & Precast Ltd., and Reinhardt Masonry Ltd. (Respondents) (*Withdrawn*)

**1840-87-R:** Ontario Council of the International Brotherhood of Painters & Allied Trades, Local 200 (Applicant) v. Bob Cinkant Painting Ltd., M & S Contracting Services Ltd., and Cinkant Contracting Services Ltd. (Respondents) (*Dismissed*)

**2274-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Sibco Inc., and 152583 Canada Inc. c.o.b. as Maxibo Inc. (Respondents) (*Granted*)

**2279-87-R:** International Beverage Dispensers' & Bartenders' Union of Hotel & Restaurant Employees' & Bartenders' International Union, Local 280 (Applicant) v. Sidsamhar Investments Ltd. (Respondent) (*Granted*)

**2436-87-R:** Sheet Metal Workers International Association, Local 30 (Applicant) v. Maxim Group General Contracting Ltd., and Rainscreen Metal Systems Inc. (Respondents) v. The Operative Plasterers' & Cement Mason's International Association of the United States & Canada, Local 172, Restoration Steeplejacks (Intervener) v. Group of Employees (Objectors) (*Withdrawn*)

## UNION SUCCESSOR RIGHTS

**1355-87-R:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Riser Dataconnect (Respondent) (*Granted*)

**1356-87-R:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Rosemount Electric (Respondent) (*Granted*)



**1357-87-R:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Superior Communications (Respondent) (*Granted*)

**2600-87-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Consumers Packaging Inc. (Respondent) (*Granted*)

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**0901-86-R:** Laura Godin (Applicant) v. United Food & Commercial Workers International Union, Local 409 (Respondent) v. Current River Foods Ltd. (Intervener) (*Dismissed*)

**0292-87-R:** Joan Timothy (Applicant) v. London & District Service Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Respondent) v. Strathroy Nursing Homes Ltd. (Intervener) (*Dismissed*)

Unit: "all employees of the intervener, save and except supervisor, registered and graduate nurses, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and office and clerical staff" (9 employees in unit)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	8
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	7
Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	3
Ballots segregated and not counted	1

**0427-87-R:** Dan McQuade, Kathy Peat et al. (Applicants) v. Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild, AFL:CIO:CLC (Respondent) v. The Globe & Mail Division of Canadian Newspapers Co. Ltd. (Intervener) (*Dismissed*)

Unit: "all employees of the Globe & Mail Division of Canadian Newspapers Company Limited in its advertising sales department in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, secretary to the Director of Advertising Sales, secretary to the General Sales Manager Retail and Classified, secretary to the General Sales Manager National and Report on Business, secretary to the Telephone Sales Manager, part-time employees and students employed during the school vacation period" (122 employees in unit)

Number of names of persons on list as originally prepared by employer	122
Number of persons who cast ballots	114
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	113
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	61
Number of ballots marked against respondent	51
Ballots segregated and not counted	1

**1662-87-R:** Burt Clark (Applicant) v. Energy & Chemical Workers Union, Local 58 (Respondent) v. Canadian Oxy Chemicals Ltd., Durez Division (Intervener) v. Group of Employees (Objectors) (*Dismissed*)

Unit: "all employees of the intervener in Fort Erie, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (26 employees in unit)

Number of names of persons on revised voters' list	26
Number of persons who cast ballots	26
Number of ballots marked in favour of respondent	14

Number of ballots marked against respondent 12

**1762-87-R:** Cecil DeHaan (Applicant) v. United Food & Commercial Workers International Union, Locals 633 and 175 (Respondent) v. Huntsville I.G.A. (Intervener) (*Granted*)

Unit #1: “all employees of the intervener, 388281 Ontario Limited c.o.b. as Huntsville I.G.A. Market, at Huntsville, save and except meat department employees, head cashier, department managers and persons above the rank of department manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (14 employees in unit)

Number of names of persons on list as originally prepared by employer	14
Number of persons who cast ballots	14
Number of ballots marked in favour of respondent (Local 175)	3
Number of ballots marked against respondent (Local 175)	11

Unit #2: “all employees of the intervener, 388281 Ontario Ltd. c.o.b. as Huntsville I.G.A. Market at Huntsville, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except head cashier, department managers and persons above the rank of department manager” (47 employees in unit)

Number of names of persons on list as originally prepared by employer	47
Number of persons who cast ballots	35
Number of spoiled ballots	1
Number of ballots marked in favour of respondent (Local 175)	8
Number of ballots marked against respondent (Local 175)	26

Unit #3: “all meat department employees of the intervener, 388281 Ontario Ltd. c.o.b. as Huntsville I.G.A. Market at Huntsville, save and except department managers, persons above the rank of department manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (5 employees in unit)

Number of names of persons on list as originally prepared by employer	5
Number of persons who cast ballots	5
Number of ballots marked in favour of respondent (Local 633)	0
Number of ballots marked against respondent (Local 633)	5

**1794-87-R:** Andrew Tam (Applicant) v. Amalgamated Clothing & Textile Workers Union, Toronto Joint Board (Respondent) v. Ports International Limited, and Tabi International Inc. (Intervener) (*Granted*)

Unit: “all employees of the intervener in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, employees in the intervener’s retail outlets, office, clerical, technical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (24 employees in unit)

Number of names of persons on revised voters’ list	24
Number of persons who cast ballots	24
Number of spoiled ballots	3
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	18

**2071-87-R:** James Sankey (Applicant) v. United Food & Commercial Workers International Union, Local 633 (Respondent) v. Michael York (Toronto) Limited (Intervener) (*Granted*)

Unit: “all employees of the intervener in Pickering, save and except manager of meat department, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (1 employee in unit)

Number of names of persons on revised voters’ list	1
Number of persons who cast ballots	1
Number of ballots marked in favour of respondent	0

## Number of ballots marked against respondent

1

**2220-87-R:** Owen Duffy (Applicant) v. The Canadian Brotherhood of Railway Transport & General Workers (Respondent) v. Group of Employees (Objectors) (*Granted*)

Unit: "all employees of Travelways School Transit Ltd., Metro Division at 120 Doncaster Avenue, Thornhill, save and except foremen, persons above the rank of foreman, office and sales staff, dispatchers, employees in the bargaining units for which any trade union held bargaining rights as of December 2, 1985, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (7 employees in unit)

Number of names of persons on list as originally prepared by employer	7
Number of persons who cast ballots	7
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	4

**2347-87-R:** Charles Eric Delong (Applicant) v. Energy & Chemical Workers Union (Respondent) v. DCA Canada Inc. (Intervener) (*Granted*)

Unit: "all employees of the intervener at Trenton, save and except supervisors, persons above the rank of supervisor, office and sales staff" (58 employees in unit)

Number of names of persons on list as originally prepared by employer	58
Number of persons who cast ballots	54
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	52
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of respondent	13
Number of ballots marked against respondent	41

**2348-87-R:** Basil Zuk (Applicant) v. Sheet Metal Workers' International Association, Local 562 (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

Unit: "all employees of NW Clayton Company Ltd. at Guelph, save and except journeymen sheet metal workers and registered apprentices covered by a subsisting collective agreement, non-working foremen, office and sales staff" (35 employees in unit)

Number of names of persons on revised voters' list	35
Number of persons who cast ballots	35
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	34
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of ballots marked in favour of respondent	24
Number of ballots marked against respondent	10
Ballots segregated and not counted	1

**2361-87-R:** Allison Smail (Applicant) v. Hotels, Clubs, Restaurants & Taverns Employees' Union, Local 261 (Respondent) v. 447963 Ontario Ltd., c.o.b. as Journey's End Motel Ottawa East (Intervener) (*Granted*)

Unit: "all employees employed at the intervener's motel at 1252 Michael St., Ottawa, save and except head housekeeper, front desk clerks, persons above the rank of head housekeeper and front desk clerks, persons regularly employed for not more than 24 hours per week, students, and security personnel" (5 employees in unit)

Number of names of persons on list as originally prepared by employer	5
Number of persons who cast ballots	5
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	5



**2482-87-R:** Michael Falls (Applicant) v. Teamsters Local No. 141, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. Chef Foods Division of Willett Foods Ltd. (Intervener) (*Dismissed*)

**2526-87-R:** Denise Caston (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) v. Royal Canadian Legion Branch No. 80 (Intervener) (*Dismissed*)

**2633-87-R:** Michael Manwell (Applicant) v. United Steelworkers of America, Local 8327 (Respondent) (*Granted*) (20 employees in unit)

**2865-87-R:** Philip R. Grenfell (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) (*Withdrawn*)

**2872-87-R:** Brian Probert (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Respondent) (*Granted*) (6 employees in unit)

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

**2467-87-U:** H & R Developments (Applicant) v. Canadian Union of Operating Engineers & General Workers, Local 793, and John Ricciuto (Respondents) (*Withdrawn*)

**3011-87-U:** Le Droit (division of Group UniMedia Inc.) (Applicant) v. Paul-Emile Paquett, et al., and Syndicat Québécois de l'Imprimerie et des Communications (S.Q.I.C.), Local 145 (Respondents) (*Granted*)

**3053-87-U:** Steinberg Inc. (Miracle Food Mart Division) (Applicant) v. Teamsters Local 419, and persons names on Schedule "A" of application (Respondents) (*Granted*)

**3096-87-U:** Regal Envelope Inc. (Applicant) v. Canadian Paperworkers' Union, Local 300, Joan Baptie et al. (Respondents) (*Withdrawn*)

**3099-87-U:** Regal Envelope Inc. (Applicant) v. Canadian Paperworkers' Union, Local 300 (Respondent) (*Withdrawn*)

**3100-87-U:** Regal Envelope Inc. (Applicant) v. Joan Baptie, Dorothy Boudreau et al. (Respondents) (*Withdrawn*)

**3147-87-U:** Cliffside Utility Contractors Ltd. (Applicant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46, William Weatherup, et al. (Respondents) (*Granted*)

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**0554-83-U; 0723-86-U:** United Brotherhood of Carpenters & Joiners of America, Local 1190 (Complainant) v. Labourers' International Union of North America, Local 183, and those companies listed on Schedule "A" attached to complaint (Respondents) (*Dismissed*)

**0723-86-U:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainant) v. Labourers' International Union of North America, Local 183, Michael Reilly, and Dellbrook Homes (Respondents) (*Dismissed*)

**0741-86-U:** Amalgamated Clothing & Textile Workers' Union (Complainant) v. Harding Carpets Ltd. (Respondents) (*Dismissed*)

**2292-86-U:** Delphis W. Vandette (Complainant) v. Corporation of the Township of St. Joseph, and Labourers' International Union of North America, Local 1036 (Respondents) (*Dismissed*)

- 2388-86-U:** London & District Service Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Complainant) v. Woodingford Lodge (Respondent) (*Dismissed*)
- 2853-86-U:** John Athan (Complainant) v. Toronto Transit Commission, and Amalgamated Transit Union Local 113 (Respondents) (*Withdrawn*)
- 3214-86-U:** John Koulouras (Complainant) v. Seneca College of Applied Arts & Technology (Respondent) v. Ontario Public Service Employees Union, Local 560 (Intervener) (*Dismissed*)
- 0093-87-U:** Vibert Sam (Complainant) v. Amalgamated Transit Union, Local 113 (Respondent) v. Toronto Transit Commission (Intervener) (*Dismissed*)
- 0541-87-U:** Teamsters Local No. 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Cummings Signs of Canada Ltd. (Respondent) (*Withdrawn*)
- 0906-87-U:** Irina Lazarou (Complainant) v. Canadian Auto Workers, Local 1967 (Respondent) v. McDonnell Douglas Canada Ltd. (Intervener) (*Dismissed*)
- 1044-87-U:** Canadian Union of Postal Workers (Complainant) v. JMP Maintenance Ltd. (Respondent) (*Withdrawn*)
- 1159-87-U:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Roussy Industries Ltd. (Respondent) (*Dismissed*)
- 1258-87-U:** George Hinkson (Complainant) v. Canadian Conference of Teamsters, Chemical, Energy & Allied Workers Division, Local 2177 (Respondent) v. BASF Inmont Canada Inc. (Intervener) (*Dismissed*)
- 1319-87-U:** Toronto Printing Pressmen & Assistant's Union, No. 10 (Complainant) v. Smith Folding Cartons Ltd. (Respondent) (*Withdrawn*)
- 1657-87-U:** Richard A. Askey (Complainant) v. Gilbey Canada Inc., Peter Blazier, et al. (Respondents) (*Withdrawn*)
- 1795-87-U:** United Brotherhood of Carpenters & Joiners of America, Local 1316 (Complainant) v. Wharton Industrial Developments Ltd. (Respondent) (*Withdrawn*)
- 1925-87-U:** International Molders' & Allied Workers' Union, Local 29 (Complainant) v. Galtaco Inc. (Respondent) (*Withdrawn*)
- 1939-87-U:** Ontario Public Service Employees Union (Complainant) v. Belleville Association for the Mentally Retarded (Respondent) (*Withdrawn*)
- 2052-87-U:** International Brotherhood of Electrical Workers, Local 2228 (Complainant) v. Nortec Air Conditioning Industries Ltd. (Respondent) (*Granted*)
- 2062-87-U:** International Brotherhood of Painters & Allied Trades (Complainant) v. Dant Industries Ltd. (Respondent) (*Withdrawn*)
- 2100-87-U:** United Food & Commercial Workers International Union, Local 175 (Complainant) v. 539747 Ontario Inc. (Purity Bread) (Respondent) (*Withdrawn*)
- 2186-87-U:** Lumber & Sawmill Workers' Union, Local 2693, of the United Brotherhood of Carpenters & Joiners of America (Complainant) v. Kraft Construction Co. Ltd., and Henry Raitai (Respondent) (*Withdrawn*)

**2244-87-U:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Hully Gully (Honda) (Respondent) (*Withdrawn*)

**2276-87-U:** International Beverage Dispensers' & Bartenders' Union of Hotel & Restaurant Employees' & Bartenders' International Union, Local 280 (Complainant) v. 572379 Ontario Ltd., Kanata Hotels Inc., and Sidsamhar Investments Ltd. (Respondents) (*Dismissed*)

**2294-87-U:** Doris Dalton (Complainant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC, Local 416 (Respondent) (*Withdrawn*)

**2307-87-U:** Christian Labour Association of Canada (Complainant) v. Salvation Army Eventide Home (Cambridge) (Respondent) (*Withdrawn*)

**2325-87-U:** John Ives, et al. (Complainant) v. Keeprite Workers' Independent Union (Respondent) (*Withdrawn*)

**2326-87-U:** United Steelworkers of America (Complainant) v. Rowika Industries Ltd. (Respondent) (*Granted*)

**2402-87-U:** United Steelworkers of America (Complainant) v. Angler's Cove Restaurant (Respondent) (*Withdrawn*)

**2414-87-U:** Health, Office & Professional Employees, division of United Food & Commercial Workers International Union, Local 175, AFL:CIO:CLC (Complainant) v. CedarCrest Nursing Home, division of Paragon Health Care Inc. (Respondent) (*Withdrawn*)

**2466-87-U:** Florence Patricia Parr (Complainant) v. CAW, Local 222, and General Motors (Respondents) (*Withdrawn*)

**2472-87-U:** Alan Weyers (Complainant) v. Canadian Transport Workers Union, Local 213 (Respondent) (*Withdrawn*)

**2500-87-U:** United Food & Commercial Workers International Union (Complainant) v. J.B. Foods Industries Inc. (Respondent) (*Withdrawn*)

**2511-87-U:** Service Employees' International Union, Local 210 (Complainant) v. Canadian Nursing Home, and Margaret Melton (Respondents) (*Withdrawn*)

**2531-87-U:** Carosina Morra (Complainant) v. United Steelworkers of America, Local 6269 (Respondent) (*Withdrawn*)

**2532-87-U:** Clara Cerngakovic (Complainant) v. United Steelworkers of America, Local 6269 (Respondent) (*Withdrawn*)

**2533-87-U:** Smoji Kanto (Complainant) v. United Steelworkers of America, Local 6269 (Respondent) (*Withdrawn*)

**2534-87-U:** Calogero Letizia (Complainant) v. United Steelworkers of America, Local 6269 (Respondent) (*Withdrawn*)

**2535-87-U:** Celia Yanez (Complainant) v. United Steelworkers of America, Local 6269 (Respondent) (*Withdrawn*)

**2536-87-U:** Valdez Jr. (Complainant) v. United Steelworkers of America, Local 6269 (Respondent) (*Withdrawn*)



- 2537-87-U:** Chiss Patel (Complainant) v. United Steelworkers of America, Local 6269 (Respondent) (*Withdrawn*)
- 2575-87-U:** Sophia Howes (Complainant) v. Johannis Employees Association (Respondents) (*Withdrawn*)
- 2578-87-U:** Luigi Melis (Complainant) v. United Steelworkers of America, Local 7235, District 6 (Respondent) (*Withdrawn*)
- 2591-87-U:** Union of Bank Employees, Local 2104 (Ontario) Canadian Congress (Complainant) v. Atlas & Civic Employees Credit Union Ltd. (Respondent) (*Withdrawn*)
- 2614-87-U:** Robert F. Mathias (Complainant) v. Ford Motor Co. (Canada) Ltd., and C.A.W., Local 200 (Respondents) (*Withdrawn*)
- 2619-87-U:** Ontario Public Service Employees Union (Complainant) v. The Salvation Army Wycliffe Booth House/Rebekah House (Respondent) (*Withdrawn*)
- 2642-87-U:** Joyce Davis (Complainant) v. Heritage House Retirement Home (Respondent) v. Canadian Union of Public Employees (Intervener) (*Withdrawn*)
- 2659-87-U:** Claude Desormeaux (Complainant) v. Corporation of the City of Rockland (Respondent) (*Withdrawn*)
- 2660-87-U:** Lucien Martin (Complainant) v. Corporation of the City of Rockland (Respondent) (*Withdrawn*)
- 2666-87-U:** United Brotherhood of Carpenters & Joiners of America, Local 27, and Labourers' International Union of North America, Local 506 (Complainants) v. Tactix Construction Ltd. (Respondent) (*Withdrawn*)
- 2674-87-U:** United Food & Commercial Workers International Union, Local 175 (Complainant) v. Workers' Co-operative of Consumers (Fort William) Ltd. (Respondent) (*Withdrawn*)
- 2708-87-U:** Service Employees' International Union, Local 210, S.E.I.U., AFL:CIO:CLC (Complainant) v. Salvation Army Men's Social Service Centre (Respondent) (*Withdrawn*)
- 2758-87-U:** Alejandro H. Wilson (Complainant) v. Teamsters Local 230 (Respondent) (*Dismissed*)
- 2785-87-U:** Allen R. Chevrier (Complainant) v. City Cab (Safe Drive) (Respondent) (*Withdrawn*)
- 2797-87-U:** Reginald William Gurr (Complainant) v. United Food & Commercial Workers International Union (Archie Duckworth) (Respondent) (*Withdrawn*)
- 2803-87-U:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Willett Foods Inc. (Respondent) (*Withdrawn*)
- 2816-87-U:** Labourers' International Union of North America, Local 506, and United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainants) v. Tasis Contracting Ltd. (Respondent) (*Withdrawn*)
- 2838-87-U:** Canadian Union of Public Employees (Complainant) v. Governing Council of University of Toronto (Respondent) (*Withdrawn*)
- 2842-87-U:** Hotels, Clubs, Restaurants, Taverns Employees' Union, Local 261 (Complainant) v. King George Hotel & Rheal Delage (Respondents) (*Withdrawn*)
- 2847-87-U:** Teamsters Local No. 419, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Rocamora Brothers Canada, and Jack W. Ball (Respondents) (*Withdrawn*)

**2860-87-U:** Shivsankar Singh (Complainant) v. United Steelworkers of America, Local 9139 (Respondent) (*Withdrawn*)

**2921-87-U:** Flavia Casalanguida (Complainant) v. Toronto District Council of the I.L.G.W.U., Local 14 (Respondent) (*Dismissed*)

**2940-87-U:** Labourers' International Union of North America, Ontario Provincial District Council (Complainant) v. Swindell Dressler International Co. (Respondent) (*Withdrawn*)

## **APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT**

**2863-87-M:** Goodyear Canada Inc. (Employer) and United Rubber, Cork, Linoleum & Plastic Workers of America, Local 189 (Trade Union) (*Granted*)

**2942-87-M:** Canadian Linen Supply (Ontario) Ltd. (Employer) and Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

**3079-87-M:** Strano Foods Ltd. (Employer) and Christian Labour Association of Canada (Trade Union) (*Granted*)

## **JURISDICTIONAL DISPUTES**

**1201-84-JD:** United Brotherhood of Carpenters & Joiners of America, Local 1190 (Complainant) v. Labourers' International Union of North America, Local 183, Lakeview Estates Ltd., and 529126 Ontario Inc. c.o.b. as Trimar Construction (Respondents) (*Withdrawn*)

**2381-87-JD:** The Millwright District Council of Ontario, United Brotherhood of Carpenters & Joiners of America on behalf of affiliated local unions (Complainant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46, and Calorific Construction Ltd. (Respondent) (*Withdrawn*)

## **APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS**

**2973-86-M:** Energy & Chemical Workers Union, Locals 790, 795 and 38 (Applicant) v. ICG Utilities (Ontario) Ltd. (Respondent) (*Withdrawn*)

**0982-87-M:** Board of Education for the City of Toronto (Applicant) v. Canadian Union of Public Employees, Local 1325 (Respondent) (*Granted*)

**1172-87-M:** The Corporation of the County of Essex (Applicant) v. Canadian Union of Public Employees, Local 2974.1 (Respondent) (*Withdrawn*)

**1237-87-M:** Vernon John Hermer (Applicant) v. Canadian Union of Public Employees (Respondent) (*Dismissed*)

**2070-87-M:** Canadian Union of Public Employees, Local 2898 (Applicant) v. Catholic Family Service Agency (Respondent) (*Dismissed*)

**2191-87-M:** Algoma University College Support Staff Association (Applicant) v. Algoma University College (Respondent) (*Withdrawn*)

**2192-87-M:** Hamilton General Hospital (Applicant) v. Canadian Union of Public Employees, Local 794 (Respondent) (*Granted*)

**2277-87-M:** International Beverage Dispensers' & Bartenders' Union of Hotel & Restaurant Employees' & Bartenders' International Union, Local 280 (Applicant) v. 572379 Ontario Ltd., c.o.b. as the Ascot Inn, Kanata Hotels Inc., and Sidsamhar Investments Ltd. (Respondents) (*Dismissed*)

**2749-87-M:** Canadian Union of Public Employees, Local 2504 (Applicant) v. Nepean Public Library (Respondent) (*Dismissed*)

## COMPLAINTS UNDER THE OCCUPATIONAL HEALTH & SAFETY ACT

**3147-86-OH:** Garry Sidock, and Herbert A. McConnell (Complainants) v. Playtex Ltd. (Respondent) (*Dismissed*)

**0951-87-OH:** Danny Dadula (Complainant) v. Art Benvenuto, President & General Mgr., Eli Lilly Canada Inc. (Respondent) (*Withdrawn*)

**1923-87-OH:** Franco Salerno (Complainant) v. York Volkswagen Ltd. (Respondent) (*Withdrawn*)

## CONSTRUCTION INDUSTRY GRIEVANCES

**1403-85-M:** Canadian Union of Operating Engineers & General Workers, Local 793 (Applicant) v. Stucor Construction Ltd. (Respondent) (*Withdrawn*)

**2669-86-M:** International Union of Bricklayers & Allied Craftsmen, Local 700 (Applicant) v. Donald Morris, c.o.b. as Advance Welding & Fabrication (Respondent) (*Granted*)

**2740-86-M:** Labourers' International Union of North America, Local 527 (Applicant) v. Colibri Construction Inc. (Respondent) (*Granted*)

**0943-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 2965 (Resilient Floor Workers) (Applicant) v. Interior Floorcoverings Ltd. (Respondent) (*Granted*)

**1333-87-G:** Canadian Union of Operating Engineers & General Workers, Local 793 (Applicant) v. Cooper's Crane Rental (1987) Ltd. (Respondent) (*Withdrawn*)

**1347-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Keele Carpentry Ltd. (Respondent) (*Granted*)

**1809-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. J.R. Noel Plastering Ltd. (Respondent) (*Withdrawn*)

**1878-87-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Applicant) v. Harris, V.S.L. Canada Ltd. (Respondent) (*Withdrawn*)

**2115-87-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Calorific Construction Ltd. (Respondent) v. Millwright District Council (Intervener) (*Dismissed*)

**2351-87-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. E.S. Fox Ltd. (Respondent) (*Dismissed*)

**2363-87-G:** Canadian Union of Operating Engineers & General Workers, Local 793 (Applicant) v. Pitts Engineering Construction Ltd. (Respondent) (*Withdrawn*)

**2440-87-G:** Sheet Metal Workers' International Association, Local 504 (Applicant) v. Canmec Mechanical Contractors Ltd. (Respondent) (*Granted*)



**2446-87-G; 24448-87-G:** International Union of Elevator Constructors, Local 50 (Applicant) v. Northern Elevator Ltd. (Respondent) (*Withdrawn*)

**2473-87-G:** Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Falls Masonry Ltd. (Respondent) (*Withdrawn*)

**2488-87-G:** Sheet Metal Workers' International Association & Ontario Sheet Metal Workers' Conference, Local 47 (Applicants) v. Flexmaster Canada Ltd. (Respondent) (*Withdrawn*)

**2491-87-G:** Labourers' International Union of North America, Local 527 (Applicant) v. Bectar Corporation (Respondent) (*Withdrawn*)

**2516-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Wood Framing Contracting Ltd. (Respondent) (*Withdrawn*)

**2523-87-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Electrical Power Systems Construction Association (EPSCA), and Ontario Hydro (Respondents) (*Granted*)

**2644-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 1316 (Applicant) v. Kap's Acoustical Services Ltd. (Respondent) (*Withdrawn*)

**2680-87-G; 2919-87-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Tee-Jay Mechanical Ltd. (Respondent) (*Granted*)

**2742-87-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 508 (Applicant) v. Commonwealth Construction Co. (Respondent) (*Withdrawn*)

**2745-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Gamen Paving Ltd. (Respondent) (*Withdrawn*)

**2747-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Dominion Paving Ltd. (Respondent) (*Withdrawn*)

**2764-87-G:** Carpenters' District Council of Toronto & Vicinity, United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Mario & Sons Carpenters (Respondent) (*Granted*)

**2773-87-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Medallion Multi Trade Services (Respondent) (*Withdrawn*)

**2782-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Serr-Can Paving (710579 Ontario Ltd.) (Respondent) (*Withdrawn*)

**2783-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Serrentino Equipment Inc. (Respondent) (*Withdrawn*)

**2784-87-G:** Sheet Metal Workers' International Association, Local 562 (Applicant) v. Walden Roofing & Sheet Metal Co. Ltd. (Respondent) (*Dismissed*)

**2786-87-G:** International Association of Heat & Frost Insulators & Asbestos Workers, Local 95 (Applicant) v. Richardson Brothers Insulation Co. Ltd. (Respondent) (*Granted*)

**2796-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Greenleaf Designs Ltd. (Respondent) (*Granted*)

**2807-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Industrial Concrete Forming Ltd. (Respondent) (*Withdrawn*)

**2811-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Grimaldi & Montanari Ltd. (Respondent) (*Granted*)

**2853-87-G:** Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Calligaro Tile Co. Ltd. (Respondent) (*Withdrawn*)

**2858-87-G:** Labourers' International Union of North America, Local 506 (Applicant) v. Greenspoon Brothers (Respondent) (*Withdrawn*)

**2862-87-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Claxton Mechanical Systems Ltd. (Respondent) (*Withdrawn*)

**2871-87-G:** Carpenters' District Council of Toronto & Vicinity, United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Phil Cormier (Respondent) (*Granted*)

**2885-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Jabda Canada Inc. (Respondent) (*Withdrawn*)

**2918-87-G; 2936-87-G:** Labourers' International Union of North America, Local 1089 (Applicant) v. Jackson Construction Ltd. (Respondent) (*Withdrawn*)

**2948-87-G:** Canadian Union of Operating Engineers & General Workers, Local 793 (Applicant) v. Roseway Construction Ltd. (Respondent) (*Withdrawn*)

**2956-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Kecman Enterprises Inc. (Respondent) (*Granted*)

**2973-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Wharton Industrial Developments Ltd. (Respondent) (*Granted*)

**3015-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Fairglen Carpentry (Respondent) (*Withdrawn*)

**3018-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Agrigento Group (division of 672259) (Respondent) (*Granted*)

**3019-87-G:** Carpenters' District Council of Toronto & Vicinity, United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. L.I.S. Construction Ltd. (Respondent) (*Granted*)

**3020-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Ariss Construction Inc. (Respondent) (*Withdrawn*)

**3023-87-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. All Railings, division of DFL Fabrication Ltd. (Respondent) (*Granted*)

**3039-87-G:** Millwright District Council of Ontario, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Attic Mechanical (Respondent) (*Granted*)

**3045-87-G:** Marble, Tile & Terrazzo Union, Local 31 (Applicant) v. Bradsil Ltd. (Respondent) (*Withdrawn*)

**3073-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. B-Z Construction Inc. (Respondent) (*Granted*)

## APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

**1068-83-R:** United Brotherhood of Carpenters & Joiners of America, Local 1988 (Applicant) v. Honco Inc. (Respondent) (*Dismissed*)

**2968-86-M:** Canadian Union of Public Employees (Applicant) v. Oxford County Board of Health (Respondent) (*Dismissed*)

**0905-87-R:** International Ladies' Garment Workers' Union (Applicant) v. G.H. Sportswear Manufacturing Ltd., and Antoinette Fashions Ltd. (Respondents) (*Granted*)

**0925-87-R:** United Steelworkers of America (Applicant) v. Benoma Metal Products Ltd. (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

**0942-87-U:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainant) v. Labourers' International Union of North America, Local 183, and F.T. Construction Inc. (Respondents) (*Dismissed*)

**0949-87-R:** Canadian Union of Operating Engineers & General Workers, Local 793 (Applicant) v. Morgan Welding Supply Co. Ltd. (Respondent) (*Dismissed*)

**2066-87-R:** Canadian Paperworkers Union (Applicant) v. Boise Cascade Canada Ltd. (Respondent) v. Lumber & Sawmill Workers' Union, Local 2693, of the United Brotherhood of Carpenters & Joiners of America (Intervener #1) v. International Brotherhood of Electrical Workers, Local 559 (Intervener #2) (*Dismissed*)

**2384-87-R; 2385-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Interior Wood Ltd., and Pannonia Woodworking Ltd. (Respondents) (*Dismissed*)

**2622-87-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Bradscot Construction Ltd. (Respondent) (*Granted*)











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